DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-45
Title: Michael B. Elgin, et al., Petitioners
v.
Department of the Treasury, et al.
Docketed: July 11, 2011
Lower Ct: United States Court of Appeals for the First Circuit
Case Nos.: (10-1302)
Decision Date: April 8, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Jul 7 2011	Petition for a writ of certiorari filed. (Response due August 10, 2011)
Aug 2 2011	Order extending time to file response to petition to and including September 9, 2011.
Sep 9 2011	Brief of respondents Department of the Treasury, et al. in opposition filed.
Sep 20 2011	Reply of petitioners Michael B. Elgin, et al. filed. (Distributed)
Sep 21 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 17 2011	Petition GRANTED.
Nov 22 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 8, 2011.
Nov 22 2011	The time to file respondents' brief on the merits is extended to and including January 17, 2012.
Dec 8 2011	Joint appendix filed. (Statement of costs filed)
Dec 8 2011	Brief of petitioners Michael B. Elgin, et al. filed.
Dec 15 2011	Brief amicus curiae of Elaine Mittleman filed. (Distributed)
Dec 19 2011	SET FOR ARGUMENT ON Monday, February 27, 2012.
Dec 27 2011	Record received from U.S.C.A. for 1st Circuit. (1 box)
Dec 29 2011	Record received from U.S.D.C. for District of Massachusetts. (1 box)
Jan 3 2012	CIRCULATED.
Jan 17 2012	Brief of respondents Department of the Treasury, et al. filed. (Distributed)
Feb 13 2012	Reply of petitioners Michael B. Elgin, et al. filed. (Distributed)
Feb 27 2012	Argued. For petitioners: Harvey A. Schwartz, Boston, Mass. For respondents: Eric J. Feigin, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

SUPREME COURT, U.S.
FILED

11-45

OFFICE OF THE CLERK

No. ____

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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July 2011

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QUESTION PRESENTED

Do federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees, as the Third and D.C. Circuits have held, or does the Civil Service Reform Act impliedly preclude that jurisdiction, as the First, Second, and Tenth Circuits have held?

PARTIES

Petitioners:
Michael B. Elgin
Aaron Lawson
Henry Tucker
Christon Colby

Respondents:
United States of America
U.S. Department of the Treasury
U.S. Department of the Interior

Petitioners initially also sought equitable relief against the President of the United States and the individual heads of Respondent federal agencies in their official capacities. The district court granted Petitioners' motion to dismiss their claims against the individual defendants, and those defendants are no longer parties.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a) is published at 641 F.3d 6. The district court's decision granting Petitioners' motion for partial summary judgment and denying in part and granting in part Respondents' motion to dismiss (Pet. App. 65a) is published at 594 F. Supp. 2d 133. The district court's decision granting Respondents' motion for reconsideration (Pet. App. 39a) is published at 697 F. Supp. 2d 187.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 3328 bars men who fail to register with the Selective Service from federal agency employment. In full, it provides:

(a) An individual—

> (1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 App. U.S.C. 453); and
>
> (2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual, shall be ineligible for

> appointment to a position in an Executive agency.
>
> (b) The Office of Personnel Management, in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. Such regulations shall include provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful. Such procedures shall require that such a determination may not be made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful. Such procedures may provide that determinations of eligibility under the requirements of this section shall be adjudicated by the Executive agency making the appointment for which the eligibility is determined.

The Civil Service Reform Act, 92 Stat. 1111 *et seq.*, outlines administrative procedures available to certain federal employees for certain adverse employment actions. Relevant portions of the Civil Service Reform Act are reproduced in the Appendix at 108a.

STATEMENT OF THE CASE

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are former federal employees. Each was terminated or constructively terminated from his federal employment under 5 U.S.C. § 3328, which imposes a lifetime bar on federal executive agency employment on men who do not

register with the Selective Service between the ages of 18 and 26. First Am. Compl. ¶ 2.

Elgin appealed his termination to the Merit Systems Protection Board (MSPB), arguing that 5 U.S.C. § 3328 was a Bill of Attainder and that he was discriminated against on the basis of sex. The MSPB dismissed Elgin's appeal for lack of jurisdiction. Pet. App. 95a, 104a.[1]

Elgin, Lawson, Tucker, and Colby then brought this action in district court under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, against their former employers, the United States, the U.S. Department of the Treasury, and the U.S. Department of the Interior. First Am. Compl. ¶ 5. Petitioners challenged 5 U.S.C. § 3328 as a Bill of Attainder and as violative of their constitutional rights to equal protection on the basis of sex, seeking injunctive and declaratory relief. *Id.* ¶ 4. The district court initially held that 5 U.S.C. § 3328 was a Bill of Attainder, but did not violate Petitioners' right to equal protection, and granted Petitioners' partial motion for summary judgment. Pet. App. 66a-67a. On reconsideration, the district court addressed for the first time whether it had jurisdiction over Petitioners' claims and held that it did. *Id.* at 51a. However, the district court reversed its holding on the merits, ruling that 5 U.S.C. § 3328 was not a Bill of Attainder. *Id.* at 63a-64a.

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[1]The unpublished decision of the MSPB is reproduced in the Appendix at 94a. It is also available at *Elgin v. Department of the Treasury*, No. PH-0752-08-0004-I-1, 2007 M.S.P.B. LEXIS 7502 (M.S.P.B. Nov. 16, 2007).

A divided panel of the Court of Appeals for the First Circuit vacated the district court's decision and remanded for entry of a new judgment denying Petitioners relief for lack of subject matter jurisdiction. *Id.* at 15a. Acknowledging a circuit split (*id.* at 12a n.4), the panel majority held that the district court lacked jurisdiction to review Petitioners' claims because the Civil Service Reform Act (CSRA), 92 Stat. 1111 *et seq.*, impliedly precludes federal district courts from granting equitable relief for constitutional injuries. *Id.* at 12a. Because the CSRA does not explicitly preclude such relief, the concurring judge would have found that the district court had jurisdiction. *Id.* at 18a.

A. Factual Background

The Military Selective Service Act requires all males to register with the Selective Service between the ages of 18 and 26 upon proclamation of the President. 50 U.S.C. app. § 453. Since 1980, a presidential proclamation has required registration, and all persons are, by statute, "deemed" to know about the registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980); 50 U.S.C. app. § 465(a). Failure to register is a crime, punishable by a fine of up to $10,000 and up to five years in prison. Men can be prosecuted until their 31st birthdays. *Id.* § 462(a). In addition, in 1986, Congress enacted 5 U.S.C. § 3328, which further penalizes men who knowingly and willfully fail to register by imposing a lifetime bar on federal executive agency employment. Regulations provide for the termination of employees who fail to register, and the Office of Personnel Management (OPM) is responsible for determining

whether the failure to register was knowing and willful. 5 C.F.R. § 300.707.

The Selective Service System has no record of registration for any of the Petitioners. Three of them—Elgin, Tucker, and Colby—did not become aware of the registration requirement until after their 26th birthdays, when it was too late to register. The fourth—Lawson—knew about the requirement and believes that he registered, but the Selective Service System does not have any record of his registration. Elgin, Lawson, and Colby sought determinations that their failure to register was not knowing and willful, but OPM denied their claims.

Petitioners are former employees of federal agencies. Elgin, Lawson, and Colby were terminated solely under 5 U.S.C. § 3328 because they failed to register. Tucker resigned from one agency when his failure to register became apparent, and his offer of employment from a second agency was withdrawn solely because he failed to register.

1. Michael B. Elgin was first hired by the Internal Revenue Service (IRS), an agency of the Treasury Department, in 1991 as a low-level data transcriber. Pet. App. 95a. Over the next sixteen years, Elgin consistently received glowing evaluations and was promoted to positions with increasing responsibility. First Am. Compl. ¶ 31. As part of a routine background investigation when he was offered a promotion in 2002, the IRS learned that Elgin had not registered with the Selective Service and passed that information on to OPM. *Id.* ¶¶ 32-34. Nevertheless, Elgin was promoted. *Id.* ¶ 33.

In 2003, OPM determined that Elgin was ineligible for federal employment under 5 U.S.C. § 3328 because he had failed to register with the Selective Service. Elgin sought a waiver that would permit his employment, arguing that his failure to register had not been knowing and willful because he had not been aware of the registration requirement; at age 18, he was struggling to complete high school and support his son while being virtually homeless. *Id.* ¶¶ 29-30. OPM denied his request for a waiver in 2006. Both Massachusetts Senators and the IRS asked OPM to reconsider, explaining that Elgin was a valued IRS employee whose termination would negatively affect the agency and that Elgin's failure to register was inadvertent. *Id.* ¶ 34. OPM denied the Senators' and IRS's request. *Id.* ¶ 35. Elgin was terminated on July 27, 2007. *Id.* ¶ 36.

2. Aaron Lawson has been a wildfire fighter since 1997, first with the California Department of Forestry and later with the U.S. Forest Service. *Id.* ¶ 40. He is a specialist in directing helicopter crews fighting forest fires. *Id.* ¶ 41. The Government has spent tens of thousands of dollars training him to do this dangerous work. *Id.* In 2003, the Bureau of Land Management, a division of the Interior Department, in conjunction with the U.S. Forest Service, hired him as a wildfire fighter helicopter captain. *Id.* ¶ 40. After he was hired, Lawson learned that the Selective Service has no record of his registration. *Id.* Lawson believes that he completed the registration forms at his local post office around the time of his 18th birthday. *Id.* ¶ 39. The Bureau of Land Management and U.S. Forest Service requested a waiver from OPM that would make

Lawson eligible for employment. *Id.* ¶ 42. OPM denied the waiver. Lawson was terminated. *Id.*

3. In 2007, Henry Tucker was a Financial Institution Specialist at the Federal Deposit Insurance Corporation, where he had been employed for 17 years. *Id.* ¶ 44. He had never been aware of the requirement to register with the Selective Service; Tucker's mother left him when he was 16, and he moved frequently as a teenager. *Id.* ¶ 43. In December 2007, the Federal Deposit Insurance Corporation learned that Tucker had not registered with the Selective Service and referred the matter to OPM. *Id.* ¶ 45.

Fearing that he would be fired, Tucker resigned and applied for a position with the National Institutes of Health, which offered Tucker a job as a Budget Analyst. *Id.* ¶ 46. It withdrew the offer, however, after learning that Tucker had not registered with the Selective Service. *Id.*

4. Christon Colby began working at the IRS in 2001 as a temporary employee and was hired permanently in 2002. *Id.* ¶¶ 49-52. Colby received consistently excellent performance reviews and was promoted to positions with increasing responsibility. *Id.* ¶ 53. In 2003, the IRS informed Colby that it had become aware of his failure to register with the Selective Service. *Id.* ¶ 54. Colby sought a waiver from OPM on the basis that his failure to register was not knowing and willful. Colby explained that he had moved out of his parents' home at age 18 and was unaware of the registration requirement until he was too old to register. *Id.* ¶¶ 47-48, 55.

In 2006, OPM declined to issue a waiver making him eligible for employment. *Id.* ¶ 57. Colby's supervisor at the IRS appealed the determination within OPM, explaining that Colby was "an extremely valuable and integral" employee and noting that the IRS had invested $25,000 in training Colby. *Id.* ¶ 58. OPM affirmed its decision not to issue Colby a waiver, and Colby was terminated on August 3, 2007. *Id.* ¶¶ 59-60.

B. Proceedings Before the Merit Systems Protection Board and the District Court

The Civil Service Reform Act (CSRA), 92 Stat. 1111 *et seq.*, provides that non-exempt federal employees (such as Petitioners had been) may challenge their terminations before the Merit Systems Protection Board (MSPB) under certain conditions. 5 U.S.C. §§ 7701(a), 7512(1), 7513(d). Shortly after being terminated under 5 U.S.C. § 3328, Petitioner Elgin appealed the decision to the MSPB, arguing that 5 U.S.C. § 3328 is a Bill of Attainder and that he was subject to unconstitutional sex-based discrimination because the Selective Service registration requirement only applies to men. On November 16, 2007, at the Treasury Department's urging, the MSPB dismissed Elgin's appeal for lack of jurisdiction. Pet. App. 100a-01a. The MSPB explained that it lacked jurisdiction over appeals where employees were terminated under absolute statutory prohibitions, such as 5 U.S.C. § 3328. *Id.* The MSPB also held that it lacked authority to rule on the constitutionality of a statute and noted that, to the extent it could review any constitutional or discrimination claims, it did not have jurisdiction over

those claims without an explicit grant of jurisdiction, which was absent here. *Id.* at 101a-02a.

After Elgin's MSPB appeal was dismissed, on December 28, 2007, Elgin, joined by Lawson, Tucker, and Colby, brought this action challenging the constitutionality of 5 U.S.C. § 3328 in the United States District Court for the District of Massachusetts against the United States of America, the U.S. Department of the Treasury, and the U.S. Department of the Interior (collectively, the Government). First Am. Compl. ¶ 1. Petitioners contended that 5 U.S.C. § 3328 is a Bill of Attainder prohibited by Article I, Section 9, Clause 3 of the Constitution because it legislatively imposes punishment—the lifetime bar on federal employment—on a specific group of men for their irreversible failure to register. Petitioners also contended that because the Selective Service registration requirement and employment bar applies to men and not women, it unlawfully discriminates under the equal protection component of the Fifth Amendment. *Id.* ¶¶ 1, 4. Petitioners sought declaratory and injunctive relief, including reinstatement. *Id.* ¶ 4. The claims were brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, and jurisdiction was premised on 28 U.S.C. §§ 1331, 1343, and 1346. First Am. Compl. ¶ 5. Petitioners amended the complaint in January 2008 to add a class action claim. *Id.* ¶ 1.

The Government moved to dismiss, arguing that Petitioners' claims failed on the merits. Pet. App. 66a. The Government did not, at that time, contest the district court's jurisdiction. Petitioners responded by

opposing the motion to dismiss as to the equal protection claim and seeking partial summary judgment as to liability on the Bill of Attainder claim. After a hearing, the district court granted Petitioners' motion for partial summary judgment, holding that 5 U.S.C. § 3328 was a Bill of Attainder, and granted the Government's motion to dismiss in part, holding that the Selective Service scheme did not violate Petitioners' rights to equal protection. *Id.* at 66a-67a.

Petitioners then filed a motion for class certification and sought a preliminary injunction reinstating Petitioners. The Government filed a motion for reconsideration of the district court's grant of summary judgment on the Bill of Attainder claim, contending both that the claim failed on the merits and arguing for the first time that the district court did not have subject matter jurisdiction over the claim because the CSRA precludes district court review of federal employment decisions. *Id.* at 41a-42a. The district court held that it did have jurisdiction, but granted the motion for reconsideration because it determined, on reexamination, that 5 U.S.C. § 3328 was not a Bill of Attainder. *Id.* at 51a, 63a-64a.

C. Proceedings Before the First Circuit

Petitioners appealed the district court's decisions dismissing the equal protection claim and granting the motion for reconsideration on the Bill of Attainder claim to the United States Court of Appeals for the First Circuit. The panel agreed that Petitioners' claims should be dismissed, but was divided on the question whether the district court had jurisdiction over Petitioners' constitutional claims for equitable relief. *Id.* at 15a.

The majority agreed with the Government that the CSRA provides the exclusive remedy for the termination or constructive termination of federal employees, even for facial constitutional challenges like this one. 92 Stat. 1111 *et seq.* (codified as amended in various sections of 5 U.S.C.). The CSRA permits non-exempt federal employees, such as Petitioners, to appeal their terminations to the MSPB if they were removed "for such cause as will promote the efficiency of the service." 5. U.S.C. § 7513(a); *see generally id.* §§ 7511-7514. Employees can then appeal the MSPB decision to the United States Court of Appeals for the Federal Circuit. *Id.* § 7703(b)(1). As the majority noted, this Court has held that though the CSRA does not explicitly state it is the exclusive remedy, its comprehensiveness generally precludes ordinary district court review of federal employee removals. Pet. App. 6a (citing *United States v. Fausto*, 484 U.S. 439, 443-55 (1988) and *Bush v. Lucas*, 462 U.S. 367, 368 (1983)).

The majority held that Petitioners' terminations, which were based solely on 5 U.S.C. § 3328, were nonetheless terminations made for "efficiency of the service" under 5 U.S.C. § 7513(a) and were therefore subject to the review procedures outlined by the CSRA. Pet. App. 7a-9a. Noting the circuit split on the question, the majority held that the CSRA is the exclusive remedy even when the employee brings only constitutional claims for equitable relief. *Id.* at 11a-12a & 12a n.4. Therefore, the district court lacked jurisdiction over Petitioners' claims.

The majority recognized, however, that its conclusion might be different if the CSRA provided no

remedy for Petitioners' constitutional claims. *Id.* at 13a. Though the majority did not dispute that the MSPB was powerless to strike down a statute as unconstitutional, the majority reasoned that the Federal Circuit had the authority to do so on appeal from the MSPB. *Id.* at 14a. Therefore, according to the majority, the merits of Petitioners' constitutional claims could be aired and decided at the Federal Circuit, if not the MSPB.

Petitioners had argued that their constitutional claims could not have been heard in the Federal Circuit because the Federal Circuit has itself repeatedly stated that its jurisdiction on appeal from the MSPB is coextensive with the jurisdiction of the MSPB, which would not have had jurisdiction over Petitioners' claims. The majority disagreed, reasoning that the Federal Circuit had never addressed the question of its jurisdiction under these precise circumstances and had posited that it would be required to entertain constitutional claims seeking equitable relief under *Webster v. Doe*, 486 U.S. 592 (1988). Pet. App. 14a (citing *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995) and *Brockmann v. Dep't of the Air Force*, 27 F.3d 544, 546-47 (Fed. Cir. 1994)). Even if the Federal Circuit would have held that it lacked jurisdiction to review Petitioners' constitutional claims, the majority explained, Petitioners could still have sought adjudication of their claims on certiorari in this Court. *Id.*

Judge Stahl disagreed that the district court lacked jurisdiction, but would have rejected Petitioners' claims on the merits. *Id.* at 15a. Judge Stahl sided with the

Third, Ninth, and D.C. Circuits and held that because the CSRA does not explicitly state that it prohibits employees from bringing constitutional challenges for equitable relief in district court, it does not preclude such actions. *Id.* at 23a-24a.

Judge Stahl disagreed with the majority that Petitioners' constitutional claims could have been addressed in the Federal Circuit. He explained that the Federal Circuit's jurisdiction has never exceeded the scope of the MSPB's jurisdiction on review of appeals from the MSPB, even when the appellant asserted constitutional claims beyond the MSPB's jurisdiction. *Id.* at 21a-22a (citing *Hubbard v. MSPB*, 319 Fed. App'x 192 (Fed. Cir. 2009) (unpublished)). Judge Stahl noted that in *Brockmann v. Department of the Air Force*, relied on by the majority, the Federal Circuit hypothesized about the possibility of reviewing constitutional claims but did not actually state that it would or could do so. *Id.* (discussing *Brockmann*, 27 F.3d at 546-47). Therefore, Judge Stahl reasoned, the better reading of the Federal Circuit's decisions was that it would not have had jurisdiction, and the CSRA process would not have provided any review of Petitioners' constitutional claims. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Deep and Enduring Circuit Split on the Question Whether the Civil Service Reform Act Impliedly Precludes Federal District Courts From Granting Equitable Relief on the Constitutional Claims of Federal Employees.

As the First Circuit acknowledged, this case raises a question on which there is a deep and longstanding circuit split: whether the CSRA impliedly precludes federal district courts from exercising jurisdiction over the constitutional claims of federal employees seeking injunctive relief. *Id.* at 12a n.4, 24a-25a. The Third and D.C. Circuits have held that the CSRA does not preclude district court jurisdiction over equitable constitutional claims; the First, Second, and Tenth Circuits have held that it does; and four other circuits have recognized the split.[2]

A. The Circuit Split

1. Two circuits—the Third and D.C. Circuits—have held that the CSRA does not preclude federal

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[2] *See Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1037-39 (9th Cir. 2007) (discussing circuit split); *Dotson v. Griesa*, 398 F.3d 156, 179 (2d Cir. 2005), *cert. denied*, 547 U.S. 1191 (2006) ("The circuits are divided as to whether equitable relief such as reinstatement is available to federal employees notwithstanding their general agreement that the CSRA precludes *Bivens* claims for damages."); *Hardison v. Cohen*, 375 F.3d 1262, 1266 (11th Cir. 2004) ("Several of our sister circuits have differed on whether equitable relief is precluded by the presence of a statutory remedial scheme."); *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (discussing circuit split); *Mitchum v. Hurt*, 73 F.3d 30, 34 (3d Cir. 1995) (discussing circuit split); *Bryant v. Cheney*, 924 F.2d 525, 525 (4th Cir. 1991) (discussing "tension among the circuits").

employees from bringing claims for equitable relief for constitutional injuries in federal district court. A third—the Ninth Circuit—has expressly agreed with the Third and D.C. Circuits and has held that, at least in some circumstances, federal employees may bring constitutional claims for equitable relief in district court.

In *Hubbard v. EPA*, 809 F.2d 1 (D.C. Cir. 1986), a detective with the D.C. Police Department alleged that he had been denied a position with the Environmental Protection Agency because of statements he made to the press about an investigation into illegal drug use by members of Congress. Under the CSRA, Hubbard could appeal the decision—including his constitutional claims under the First Amendment—to OPM and file a petition with the Office of Special Counsel. Hubbard brought a *Bivens* action in district court for damages as well as a claim for injunctive relief. *Id.* at 1, 3, 8.

Relying on this Court's decision in *Bush v. Lucas*, the D.C. Circuit held that Hubbard's *Bivens* claim for damages was precluded by the CSRA's comprehensive remedial scheme. In *Bush*, this Court rejected a federal employee's *Bivens* claim for damages because the "comprehensive procedural and substantive provisions" of the CSRA are "special factors counselling hesitation in the absence of affirmative action by Congress." *Bush*, 462 U.S. at 377 (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)). However, the D.C. Circuit ruled that the CSRA did not preclude Hubbard's claim for equitable relief because to eliminate courts' jurisdiction over equitable relief for constitutional violations, Congress must do so explicitly, and the CSRA did not contain any provision explicitly eliminating federal

court jurisdiction. The D.C. Circuit explained the difference:

> The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and, as *Carlson v. Green* made clear, comparatively easy for Congress to preempt. The courts' power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, L.Ed. 60 (1803). Although Congress may limit this power, *see Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), CSRA did not explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies.

Hubbard, 809 F.2d at 11 n.15.

The *Bivens* portion of the *Hubbard* decision was reheard and affirmed en banc in *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988). Although the en banc court did not rehear the question whether the CSRA also precludes constitutional claims for equitable relief, it made clear that its decision with regard to the *Bivens* claim left the equitable claim intact: "[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." *Id.* at 229-30.

In *Mitchum v. Hurt*, 73 F.3d at 36, the Third Circuit joined the D.C. Circuit in holding that the CSRA did not preclude district court jurisdiction over

constitutional claims for equitable relief. There, the plaintiffs were three current or former employees of the Pittsburgh Veterans Administration Medical Center who alleged that they were retaliated against for criticizing the level of patient care at the facility. Those employees had varying access to administrative remedies under the CSRA, including appeals to the MSPB and Federal Circuit. The employees sued in district court for declaratory and injunctive relief, alleging that their First Amendment rights had been violated. *Id.* at 31-33.

The Third Circuit followed the rationale of the D.C. Circuit, explaining that "[t]he power of the federal courts to grant equitable relief for constitutional violations has long been established." *Id.* at 35 (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 838-39, 859 (1824) and *Ex Parte Young*, 209 U.S. 123, 156 (1908)). The court reasoned that when Congress legislated, it did so against the backdrop of the judicial power to grant such relief, and courts "should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* Because Congress did not explicitly restrict equitable constitutional relief in the CSRA, the CSRA did not preclude such relief. *Id.* at 36.

In *American Federation of Government Employees Local 1 v. Stone*, the Ninth Circuit addressed the question whether an airport security screener could bring a claim for equitable relief in federal district court based on the violation of his First Amendment rights to engage in union activities. 502 F.3d 1027. Because airport security screeners' employment is

governed solely by the Aviation and Transportation Security Act (ATSA), and screeners are not entitled to any remedies under the CSRA, *Stone* presented a slightly different question from those in *Hubbard* and *Mitchum*. *See id.* at 1030-31, 1035-36. Rather, as the Ninth Circuit explained, *Stone* was very similar to *Webster v. Doe*, 486 U.S. 592, in which this Court held that a discharged CIA employee could bring a constitutional claim for equitable relief in district court because the statute governing the CIA contained no explicit prohibition against bringing constitutional claims. As in *Stone*, the employee in *Webster* was not entitled to any CSRA remedies and served at the unfettered discretion of the agency. Unlike in *Webster*, however, in *Stone*, the Government argued in the district court that the CSRA, as the comprehensive and exclusive remedial scheme for federal employees, precluded the screener from bringing a constitutional claim for equitable relief in district court. The district court agreed, holding that the screener's claim was precluded by the CSRA. *Stone*, 502 F.3d at 1031.

On appeal, the Ninth Circuit stated that whether the CSRA precluded district court review of constitutional claims where the employee has no other remedy was an open question in the circuit. *Id.* at 1034 (quoting *Stanley v. Gonzales*, 476 F.3d 653, 657 (9th Cir. 2007)). In reversing the district court, the Ninth Circuit expressly agreed with the reasoning of *Hubbard* and *Mitchum* and held "that the statutory scheme governing [the screener's] employment does not

clearly state an intention on the part of Congress to preclude judicial review." *Id.* at 1039.[3]

2. In this case, the First Circuit majority joined the Second and Tenth Circuits in holding that the CSRA impliedly precludes district courts from exercising jurisdiction over federal employees' constitutional claims for equitable relief.

In *Lombardi v. Small Business Administration*, a Presidential Management Intern at the Small Business Administration sued in district court alleging that his constitutional rights were violated when he was terminated from his position. 889 F.2d 959, 960 (10th Cir. 1989). After finding that the district court lacked jurisdiction over Lombardi's *Bivens* claim for damages, the Tenth Circuit also rejected Lombardi's argument that the district court had jurisdiction over his claim for injunctive relief, reasoning that claims for damages and equitable relief were equally precluded by the CSRA's comprehensive remedial scheme. *Id.* at 960-62.

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[3] *Stanley* explicitly avoided resolving the question whether the CSRA precludes district court review of equitable constitutional claims when the employee has no other remedy, affirming the district court's dismissal because the plaintiff's constitutional claims were not colorable. 476 F.3d at 655. An earlier Ninth Circuit case, *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991), which denied a plaintiff leave to amend his complaint to add a claim for injunctive relief, is sometimes cited for the proposition that the rule in the Ninth Circuit is that the CSRA *does* preclude district court jurisdiction over constitutional claims. *See, e.g.*, *Mitchum*, 73 F.3d at 34. However, *Stone* both explicitly endorsed the reasoning in *Hubbard* and *Mitchum* and questioned the rationale in *Saul* because *Saul* failed to mention this Court's decision in *Webster*. *Stone*, 502 F.3d at 1037-38.

In *Dotson v. Griesa*, the Second Circuit acknowledged a circuit split on the question whether the CSRA precludes district court jurisdiction over federal employees' constitutional claims for equitable relief. 398 F.3d at 179-80. There, the plaintiff was terminated from his position as a probation officer for the Southern District of New York. He sought monetary and equitable relief on his claim that his constitutional rights to equal protection and due process had been violated. *Id.* at 159. The CSRA does not provide remedies for employees of the judicial branch, but the judiciary has its own administrative appeals process. *Id.* at 160. The Second Circuit held that, like other federal employees, judicial branch employees may not bring *Bivens* actions because of the comprehensive nature of the CSRA. *Id.* at 176. The Second Circuit also found that because Congress had "plainly expressed its intent" that the CSRA be the "comprehensive scheme addressing the employment rights of federal employees," Dotson's claims for equitable relief were also precluded by the CSRA. *Id.* at 182.[4]

3. In addition, the Fourth, Seventh, and Eleventh Circuits have recognized the circuit split, *see supra* note 2, but avoided deciding the question. The Fourth

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[4]The Eighth Circuit has also held that the district court lacks jurisdiction over constitutional claims by federal employees for both monetary and injunctive relief, at least when there are remedies for the constitutional claims available under the CSRA. *Carter v. Kurzejeski*, 706 F.2d 835 (8th Cir. 1983). However, the Eighth Circuit did not address the question of equitable relief separately from the question of damages, and *Carter* predated this Court's decisions in *Bush* and *Webster*. *Id.*

Circuit noted the "weight and difficulty of the issue," but disposed of the case by finding that the plaintiff lacked standing to seek the requested injunctive relief. *Bryant*, 924 F.2d at 528-29. The Seventh and Eleventh Circuits skipped the "difficult" jurisdictional question and determined that the plaintiffs' constitutional claims failed on the merits. *Paige*, 91 F.3d at 44-45; *Hardison*, 375 F.3d at 1268.

Thus, of the circuits to have considered the question whether the CSRA precludes district court jurisdiction of federal employees' constitutional claims for equitable relief, two have held that there is jurisdiction in the district court, three have held that there is not, and three have deliberately left the question open.

B. This Court's Intervention Is Needed to Resolve the Split.

Because of this conflict in the circuits, federal employees who file suit in the Third and D.C. Circuits can be awarded injunctive relief for constitutional violations, while those in the First, Second, and Tenth cannot. For example, if this suit had been brought in the District of Columbia, where Petitioner Tucker lives, rather than in Massachusetts, where Petitioner Elgin lives, Petitioners would, by accident of geography, be able to pursue their claims in district court. This inequitable treatment of federal employees is disruptive to employees and their managers, whose rights and remedies should not turn on the circuit in which they live.

Moreover, this issue will not be resolved without this Court's intervention. The circuits have been split for more than twenty years, and there is no movement

toward a consensus view. A number of circuits are at a loss as to how to resolve the issue and are deciding the merits of the plaintiffs' claims rather than the jurisdictional question—an approach at odds with this Court's holding in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), that jurisdictional questions be determined first. *See Paige*, 91 F.3d at 44-45; *Hardison*, 375 F.3d at 1268. Even circuits that have come to a conclusion as to whether the CSRA precludes equitable claims in the district have acknowledged that there are colorable arguments on both sides of the issue. *See Dotson*, 398 F.3d at 180; *Mitchum*, 73 F.3d at 34; *see also* Pet. App. 15a (Stahl, J., concurring) (recognizing that the majority reached a "reasoned conclusion").

Several circuits have also discussed the difficulty in navigating this Court's decisions in *Bush* and *Webster* and have called on this Court to clarify those precedents. *See Mitchum*, 73 F.3d at 34 ("Without more specific guidance from the Supreme Court, we do not think that [precluding equitable relief for constitutional claims] is a jump that we should make."). Commenting on the "weight and difficulty of the issue," the Fourth Circuit noted that "[r]esolution of this issue is made more difficult by a distinction the Supreme Court seems to have drawn between *Bivens* actions for damages and equitable claims for injunctive or declaratory relief." *Bryant*, 924 F.2d at 528, 528 n.2.

The confusion caused by the split among the circuits is compounded by the Government's inconsistent position as to whether the federal courts have jurisdiction over constitutional claims for equitable relief. For example, as noted earlier, in this

case, the Government argued that the CSRA precluded federal court jurisdiction, but not until Petitioners succeeded on their Bill of Attainder claim. Pet. App. 41a-42a. In contrast, in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), the Government conceded that the CSRA's text was not clear enough to foreclose judicial review of an employee's federal constitutional claims. *Stone*, 502 F.3d at 1034 (discussing the Government's position in *Whitman*); *see* Brief for Respondents at 47, *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006) (No. 04-1131), 2005 WL 2738321 ("The language of the CSRA does not appear to meet the "heightened showing," *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims."). In *Stone*, the Government argued in the district court that the CSRA precluded district court jurisdiction but reversed its position in the court of appeals. 502 F.3d at 1034.

In short, whether the CSRA precludes federal court jurisdiction of constitutional claims for equitable relief is a difficult question that has divided the circuits and should be answered by this Court.

II. The Federal District Court Has Jurisdiction Over Petitioners' Constitutional Claims for Equitable Relief.

Certiorari is also warranted because the First Circuit's decision was wrong on the merits in several ways. First, Courts should not construe statutes to preclude injunctive relief for constitutional claims absent a clear statement by Congress that it intended to do so. Second, the First Circuit was wrong to conclude that the CSRA's procedures provide an

avenue for judicial review of Petitioners' constitutional claims.

A. The CSRA Does Not Preclude Federal District Court Jurisdiction Over Constitutional Claims for Equitable Relief.

This Court has held that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster*, 486 U.S. at 603 (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)). It is undisputed that the CSRA does not expressly preclude judicial review of constitutional claims. Therefore, it does not preclude original federal district court jurisdiction over federal employees' constitutional claims for equitable relief, and the First Circuit's holding that the CSRA impliedly precludes constitutional claims is contrary to *Webster*.

The First, Second, and Tenth Circuits, in holding that the CSRA precludes judicial review over equitable constitutional claims, have ignored *Webster* and instead relied on this Court's decisions in *Bush v. Lucas* and *United States v. Fausto*—both of which predate *Webster*—and *Schweiker v. Chilicky*, which was decided within days of *Webster*. *Bush, Fausto*, and *Chilicky*, however, are inapposite. To start, *Fausto* held only that the CSRA's comprehensive scheme precluded non-CSRA *statutory* remedies under the Back Pay Act. 484 U.S. at 455. Thus, *Fausto* has no bearing on whether the CSRA precludes claims for *constitutional* violations, and, as *Webster* holds, for a statute to foreclose constitutional claims, there must be a "heightened showing" that Congress intended to do so. 486 U.S. at 603.

Bush held that an employee's *Bivens* claim for money damages was precluded by the CSRA's comprehensive remedial scheme. 462 U.S. at 390. However, *Bush* does not support the conclusion that claims for equitable relief are also precluded. *See Mitchum*, 73 F.3d at 36. First, *Bivens* actions can be defeated either when Congress has foreclosed them or when there are "special factors counselling hesitation" in extending *Bivens* remedies into new contexts. *Bush*, 462 U.S. at 378. A comprehensive remedial scheme that forecloses particular remedies—such as the availability of money damages—is a special factor counseling hesitation. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Thus, *Bush* did not hold that any provision in the CSRA precluded constitutional claims; indeed, *Bush* acknowledged that the CSRA does not expressly deny employees judicial remedies. 462 U.S. at 378. Rather, *Bush* held that the comprehensive scheme was a special factor counseling hesitation in extending the availability of damages claims, a factor that matters in the *Bivens* context, but not in the context of claims for equitable relief. *See id.* at 377-78, 388, 390. *Chilicky* reached the same conclusion with regard to *Bivens* actions in the context of Social Security disability claims, and, like *Bush*, does not control whether equitable remedies are available. *See Chilicky*, 487 U.S. at 414, 425.

Second, this Court has long recognized the distinction between legal relief and equitable relief for constitutional claims, and there is an established tradition of federal courts awarding equitable relief to redress constitutional injuries. *See, e.g., Carlson*, 446

U.S. at 42 (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established."); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (There is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Ex Parte Young*, 209 U.S. 123; *United States v. Lee*, 106 U.S. 196 (1882); *Osborn*, 22 U.S. (9 Wheat.) at 868; *see also Hubbard*, 809 F.2d at 11 n.15 ("The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself.") (citing *Marbury*, 5 U.S. (1 Cranch) 137).

Indeed, in *Whitman*, this Court highlighted that the federal courts presumptively have jurisdiction over constitutional claims under 28 U.S.C. § 1331. 547 U.S. at 513-14. *Whitman* explained that the question is not whether the CSRA provides for federal court jurisdiction over constitutional claims, but rather whether it precludes the jurisdiction that the courts already have. *Id.*

Because it is well established that equitable relief is available for constitutional claims in federal court and neither the CSRA nor the *Bush* line of cases precludes that remedy, the federal courts have jurisdiction over federal employees' constitutional claims for equitable relief. The First Circuit's error is another reason to grant review.

B. Petitioners Have No Remedies for Their Constitutional Claims Under the CSRA.

After holding that the CSRA precludes original federal court jurisdiction over Petitioners' constitutional claims for equitable relief, the First Circuit recognized that denying Petitioners *any* remedy for their constitutional injuries would be problematic. Pet. App. 13a. The First Circuit did not discuss this Court's decision in *Webster*, but reflected its sentiment: "a 'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Thus, to avoid that serious constitutional dilemma, the First Circuit found that Petitioners' injuries could be remedied under the procedures provided by the CSRA.

First, the First Circuit decided that the MSPB did have jurisdiction to review Petitioners' terminations even though the MSPB has consistently held, including in Elgin's case, that it lacks jurisdiction to review 5 U.S.C. § 3328 terminations of men who failed to register with the Selective Service. Pet. App. 9a; *see* cases cited *infra* note 5. The MSPB's jurisdiction is not plenary; its jurisdiction is limited to what is conferred by statute, rule, or regulation. *Maddox v. Merit Sys. Prot. Bd.*, 759 F.2d 9, 10 (Fed. Cir. 1985). The First Circuit reasoned that the CSRA provided for MSPB jurisdiction over Petitioners' appeals in 5 U.S.C. § 7513(a) and (d), which state that those adverse actions, such as terminations, taken to "promote the

efficiency of the service" may be appealed to the MSPB. Pet. App. 9a.

When Petitioner Elgin appealed his termination under § 3328 to the MSPB, the Government argued that the MSPB did *not* have jurisdiction to review his removal, and the MSPB agreed, dismissing Elgin's appeal. *Id.* at 100a-01a. The MSPB reasoned that once OPM makes its final, unreviewable determination that an individual is ineligible for federal employment under § 3328, § 3328 is an absolute statutory bar to employment, and the MSPB lacks jurisdiction to review terminations made under absolute statutory bars. *Id.*; *see* 5 C.F.R. § 300.706(c) (OPM's decision is administratively unreviewable). Because those employees were never eligible for employment in the first place, the MSPB maintained, they are not afforded the procedural protections of the CSRA, including appeal to the MSPB. Pet. App. 98a (citing *Travaglini v. Dep't of Ed.*, 18 M.S.P.R. 127, 137-38 (M.S.P.B. 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419 (M.S.P.B. 1984)); *see also Daneshpayeh v. Dep't of the Air Force*, No. 93-3476, 1994 WL 18964 (Fed. Cir. Jan. 26, 1994) (unpublished) (affirming MSPB dismissal for lack of jurisdiction when there was an absolute statutory bar to employee's federal employment). Indeed, under this reasoning, and at the persistent urging of the Government, the MSPB has consistently and uniformly dismissed appeals from § 3328 removals for lack of jurisdiction.[5]

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[5] *E.g.*, *Charner v. OPM*, No. PH-3443-08-0601-I-2, 2009 M.S.P.B. LEXIS 1296, at *10-*11 (M.S.P.B. Mar. 6, 2009) (continued...)

After Elgin's appeal to the MSPB was dismissed, Elgin filed this suit in district court where, in its motion for reconsideration, the Government reversed its position, arguing that the MSPB *did* have jurisdiction to review Petitioners' terminations under its "efficiency of the service" theory. Pet. App. 41a-42a, 46a. The district court rejected the Government's argument, reasoning that nothing about Petitioners' terminations indicated they were for the "efficiency of the service," and, in addition, OPM's regulations state that after it has made its final determination that an employee's failure to register was knowing and willful, "[t]here is no further right to administrative review." 5 C.F.R. § 300.706(c); Pet App. 46a-47a. As noted above, however, the First Circuit reversed the district court and held that the MSPB does have jurisdiction to review appeals of men terminated for failing to register with the Selective Service.

As a practical matter, it is irrelevant to the MSPB what the First Circuit has said about its jurisdiction. The Federal Circuit, not the First Circuit, has appellate review over the MSPB. 28 U.S.C. § 1295(a)(9). Thus, the MSPB will continue to dismiss

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[5](...continued)
(unpublished); *Whitfield v. Dep't of the Interior*, No. DC-0752-09-0094-I-1, 2008 M.S.P.B. LEXIS 6910, at *1, *4, *7 (M.S.P.B. Dec. 23, 2008) (unpublished) (characterizing employee's claims of MSPB jurisdiction as frivolous); *Rivera v. Dep't of Veterans Affairs*, No. NY-0752-08-0137-I-1, 2008 M.S.P.B. LEXIS 2056, at *7 (M.S.P.B. Mar. 31, 2008) (unpublished); *Clarke v. OPM*, No. DA-3443-07-0538-I-1, 2007 M.S.P.B. LEXIS 7101, at *1 n.1, *7 (M.S.P.B. Dec. 17, 2007) (unpublished) (characterizing employee's claims of MSPB jurisdiction as frivolous).

appeals of § 3328 terminations, leaving former employees like Petitioners caught in a catch-22: The MSPB will dismiss their administrative appeals for lack of MSPB jurisdiction, and the district courts in the First Circuit (and in the Second and Tenth Circuits as well) will dismiss their judicial complaints for lack of district court jurisdiction, in part on the premise that their claims ought to have been brought before the MSPB. Petitioners do not believe that this Court would need to reach the issue whether the MSPB has jurisdiction to hear constitutional claims because the district courts have jurisdiction to hear those claims in any event. But the continuing controversy over the MSPB's jurisdiction and the Government's inconsistent position on the issue demonstrates that this Court's guidance is needed to ensure that federal employees' constitutional claims can be addressed in some forum.

Though the First Circuit held that the MSPB did have jurisdiction over Petitioners' constitutional claims, it acknowledged that the Petitioners' specific constitutional claims could not be considered by the MSPB because the MSPB lacks the power to declare acts of Congress, such as § 3328, unconstitutional. Pet. App. 13a, 101a; *see also Johnson*, 415 U.S. at 368; *Brooks v. Office of Pers. Mgmt.*, 59 M.S.P.R. 207, 215 (M.S.P.B. 1993). However, the First Circuit held that even if the MSPB could not consider Petitioners' requests for relief, the Federal Circuit could do so on appeal from the MSPB. Pet. App. 13a. The Federal Circuit, though, has consistently held that the scope of its jurisdiction on appeal from the MSPB is coextensive with the MSPB's, and has never addressed issues beyond the limit of what the MSPB could review. *See*

Perez v. Merit Sys. Prot. Bd., 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits of Perez's challenge . . . were not before the MSPB for decision; nor are they before us."); *Manning v. Merit Sys. Prot. Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) ("If the MSPB does not have jurisdiction, neither do we . . . ."); *Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) ("[T]he scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the board.").

The First Circuit predicted, nonetheless, that the Federal Circuit would review constitutional claims that are unreviewable by the MSPB because the Federal Circuit had stated that if otherwise unreviewable colorable constitutional claims were before it, it would have to review them under *Webster*. Pet. App. 14a. The First Circuit, however, overstated the Federal Circuit's position. In *Brockmann v. Department of the Air Force*, a divided panel of the Federal Circuit held that the employee's constitutional claims were not colorable, but did not actually hold whether it would be obligated to review the employee's constitutional claims under *Webster* were they colorable. 27 F.3d at 546-47. *Riggin v. Office of Senate Fair Employment Practices*, also cited by the First Circuit, did consider the constitutional claims of an employee that had not been heard in the administrative board below, but the Federal Circuit had first held that, under the statutory scheme at issue there, the board should have reviewed the claim. 61 F.2d at 1570. Thus, neither case squarely decided the issue.

Indeed, the First Circuit's assumption that the Federal Circuit would address an issue on appeal that

had not been heard—and could not have been heard—in the tribunal below is contrary to general principles of appellate jurisdiction. As the dissenting judge in *Brockmann* explained, reviewing an issue on appeal for the first time—including the issues of whether an employee's constitutional claims are colorable—is not only jurisdictionally precluded, but ill advised because the reviewing court lacks the benefit of a developed record. 27 F.3d at 550 (Newman, J., dissenting).

In short, the First Circuit concluded that even if the district court lacked jurisdiction over Petitioners' constitutional claims, those claims could be aired in the MSPB and the Federal Circuit, contrary to those bodies' own practices and rulings regarding their jurisdiction, in effect, leaving no forum for Petitioners' claims. The First Circuit's acrobatics highlight why this Court should resolve the circuit split and hold that district courts have jurisdiction over federal employees' constitutional claims for equitable relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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July 2011

United States Court of Appeals for the First Circuit

10-1302

MICHAEL B. ELGIN; AARON LAWSON; HENRY TUCKER; CHRISTON COLBY, on behalf of themselves and similarly situated men throughout the United States,

Plaintiffs, Appellants,

v.

U.S. DEPARTMENT OF THE TREASURY; U.S. DEPARTMENT OF THE INTERIOR; UNITED STATES,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, *U.S. District Judge*]

Before

Boudin, Stahl and Howard,

Circuit Judges.

Harvey A. Schwartz with whom *Rodgers, Powers & Schwartz* was on brief for appellants.

Jeffrey Clair, Civil Division, Department of Justice, with whom *Michael S. Raab*, Civil Division, Department of Justice, *Tony West*, Assistant Attorney General, and *Carmen Ortiz*, *United States Attorney*, were on brief for appellees.

April 8, 2011

BOUDIN, *Circuit Judge.*

A federal statute bars employment in the Executive Branch of citizens and resident aliens who were required to register for the draft with the Selective Service System and who "knowingly and willfully" did not do so before age twenty-six. In the district court, four plaintiffs, who are male United States citizens over age twenty-six, sought to challenge this statutory bar on constitutional grounds, failed on the merits, and now appeal.

The statutory bar reads as follows:

> An individual—
>
> (1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C.App. 453); and
>
> (2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual,
>
> shall be ineligible for appointment to a position in an Executive agency.

5 U.S.C. § 3328(a) (2006).[1] Section 3 of the Military Selective Service Act, 62 Stat. 604, 605, as amended,

[1] "Executive agency" is defined to mean an "Executive department, a Government corporation, and an independent establishment." 5 U.S.C. § 105.

50 U.S.C. app. § 453 (2006), empowers the President to require every male citizen and male resident alien between the ages of eighteen and twenty-six to register for the draft. In 1980, President Carter reinstituted the registration requirements for young men. Proclamation No. 4771, 3 C.F.R. 82 (1981), *reprinted as amended in* 50 U.S.C. app. § 453 app. at 59–60.

The Office of Personnel Management ("OPM"), which manages civil service employment in the Executive Branch, has adopted corresponding regulations. 5 C.F.R. §§ 300.701–.707 (2010). These regulations provide that a civil service employee who was required to register

> will be terminated by his agency under the authority of the statute and these regulations if he has not registered as required, unless he registers or unless, if no longer eligible to register, OPM determines in response to his explanation that his failure to register was neither knowing nor willful.

Id. § 300.707.

Three of the plaintiffs in this case were discharged by their federal agencies when it was discovered that they had not registered although required to do so; the fourth resigned when confronted with his failure to register and says that his resignation was forced by the statutory bar. None of the four presently challenges the premise that his failure to register was knowing or willful, and none sought to pursue to the end the statutory remedies prescribed for civil service employees who dispute their removals.

Instead, the plaintiffs brought an original action in the district court seeking reinstatement and claiming that the statutory bar is unconstitutional; the grounds asserted are that it is both a forbidden bill of attainder under Article I, Section 9, Clause 3 of the Constitution and, because it applies to men but not women, an unlawful discrimination under the equal protection component of the Fifth Amendment. The latter claim has already been rejected by the Supreme Court, *Rostker v. Goldberg*, 453 U.S. 57 (1981), but the plaintiffs may intend to ask the Court to revisit the ruling.

In the district court, the government asserted that the claims were barred because the plaintiffs had a statutory route to dispute their removals or forced resignation and that this route was intended by Congress to be exclusive for cases covered by the statutory remedy. This statutory remedy, which will be described in more detail hereafter, ordinarily leads through the Merit Systems Protection Board ("MSPB" or "Board") and, on judicial review, to the U.S. Court of Appeals for the Federal Circuit. Three of the four plaintiffs did not pursue this avenue; one did but abandoned it after an adverse decision by the MSPB administrative law judge.

The district court declined to dismiss the action on jurisdictional grounds, initially sided with the plaintiffs on the bill of attainder issue, and ultimately reversed ground and decided against the plaintiffs on their constitutional claims. *Elgin v. United States*, 594 F. Supp. 2d 133 (D. Mass. 2009), *vacated*, 697 F. Supp. 2d 187 (D. Mass. 2010). The plaintiffs now seek review

in this court; the government continues to argue both that the district court had no jurisdiction and that, if it did, the statutory bar is constitutional. An objection to subject matter jurisdiction takes priority, and we begin (and end) with that issue.

Ordinarily, and as a default remedy, a district court has authority as a federal court of general jurisdiction—subject to various limitations—to consider claims against federal government officials that they are acting unconstitutionally and should be enjoined. *See* 28 U.S.C. § 1331 (2006); *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 701–02 (1949). Suits against the federal government itself or its departments—the plaintiffs' target here—are complicated by sovereign immunity considerations, *see, e.g., FDIC v. Meyer*, 510 U.S. 471, 475 (1994), but the government has invoked no such defense in this case, *see* 5 U.S.C. § 702; *Edelman v. Jordan*, 415 U.S. 651, 668 (1974).

Instead, the government argues the exclusive remedy for the removal or forced resignation of the four plaintiffs is provided by the Civil Service Reform Act ("CSRA"), Pub. L. No. 95–454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.). The CSRA scheme, set forth in Title 5, Chapter 75, Subchapter II and augmented by regulations, allows certain employees in the civil service—including those (such as the plaintiffs) in the competitive service—to seek review if they are removed "for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a); the route prescribed is by appeal to the MSPB and, if dissatisfied with the result, appeal to the

Federal Circuit, whose decisions in turn are reviewable by the Supreme Court.[2]

Although the CSRA does not in terms describe this scheme as exclusive of other remedies, Congress intended the scheme—at least where it applies and provides a mechanism for administrative and judicial review and relief—to be exclusive of ordinary district court actions to challenge a removal. The Supreme Court has suggested that this is so, *United States v. Fausto*, 484 U.S. 439, 443–55 (1988); *see also Bush v. Lucas*, 462 U.S. 367, 388–89 (1983); we have recognized it to be so, *Berrios v. Dep't of the Army*, 884 F.2d 28, 31 (1st Cir. 1989); and the legislative history bears out this intention, S.Rep. No. 95–969, at 9–10, 53, 63 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2731–32, 2775, 2785.

The plaintiffs do not contest the view that the statutory route, where it applies, is the exclusive remedy for an employee challenging removal; but they argue that the government has taken inconsistent positions and that, in any event, for various reasons the statutory remedy is not available to them. However, the statutory route does in fact give the plaintiffs a route to direct review of their constitutional claims by an Article III court; Congress intended that route to be exclusive in removal cases; and, despite

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[2] *See* 5 U.S.C. §§ 7511–7514, 7701–7703; 5 C.F.R. §§ 752.401–.406, 1201.3, 1201.120. The remedy extends to "forced resignations"—the claim made by one of the plaintiffs here—which are treated as constructive "removals." *See Carrow v. MSPB*, 626 F.3d 1348, 1352–53 (Fed. Cir. 2010).

some confusion in the precedents, both literal language and Congress' policy require that result.

First, the plaintiffs suggest that the government's objection is foreclosed because (a) it resisted efforts by one of the plaintiffs to raise this very kind of claim through the MSPB route, and (b) it has raised the subject matter jurisdiction claim only on reconsideration in the district court. But, as it turns out, the government is within its rights to raise the objection: subject matter jurisdiction claims are not waivable and may be raised for the first time even on direct appeal, Fed. R. Civ. P. 12(h)(3); *United States v. Cotton*, 535 U.S. 625, 630 (2002).

Failure to exhaust administrative remedies is a waivable objection. *Global NAPs, Inc. v. Verizon New Eng. Inc.*, 603 F.3d 71, 85 (1st Cir. 2010). But, if the CSRA remedy is available and intended to be exclusive, it does not prescribe some administrative step required before resorting to district court, *e.g.*, *Woodford v. Ngo*, 548 U.S. 81, 88–89 (2006); rather, the remedy *displaces* the plenary district court action entirely, just as a statute channeling agency review to a circuit court displaces a direct review action in the district court. *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 513–14 (2006) (per curiam).

Second, the remedy in Chapter 75, Subchapter II applies to removals "for such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), and the question arises whether removal on account of the statutory bar falls in that category. Arguing that section 7513(a) is limited to misconduct, the plaintiffs cite Supreme Court language stating that "Chapter 75

of the Act governs adverse action taken against employees for the 'efficiency of the service,' which includes action of the type taken here, based on misconduct," *Fausto*, 484 U.S. at 446. However, "includes" does not mean "limited to."

The CSRA is a successor to earlier civil service statutes, including the Lloyd–La Follette Act, which created the first general statutory protection for civil servants, *see Arnett v. Kennedy*, 416 U.S. 134 (1974), and used the same "efficiency of [the] service" phrase as the substantive standard for removal, *see* Act of Aug. 24, 1912, ch. 389, § 6, 37 Stat. 539, 555 (repealed 1978). That standard was understood to include removals that were based on disqualifying conditions that existed before the employees were hired, and Congress was aware of and intended to adopt this interpretation.

Thus, prior to the CSRA's enactment, the Senate Committee on Governmental Affairs noted that for covered civil service employees, "existing law provides that an individual may be removed only for such cause as will promote the efficiency of the service." S. Rep. No. 95–969, at 9 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2731. The committee reported that in 1976, 17,157 federal employees had been dismissed under that standard, and it listed eight different categories, including 240 "[r]emoved because of some condition that existed before they were hired." *Id.* In recommending section 7513, the committee said that it did not intend any substantive change to the existing law permitting removals only for "efficiency of the

service." *Id.* at 50, reprinted in 1978 U.S.C.C.A.N. at 2772.

OPM shares this view of the "efficiency of the service" standard. In a related part, 5 C.F.R. pt. 731, OPM regulations discuss the standard for a "suitability action," including a "removal," 5 C.F.R. § 731.203; the regulations state that a suitability action may be taken only to "protect the integrity or promote the efficiency of the service," *id.* § 731.201, which includes "[a]ny statutory or regulatory bar which prevents the lawful employment of the person involved in the position in question," *id.* § 731.202(b)(8). *See also id.* § 731.501(a) (right to appeal suitability action to the MSPB).

Third, the plaintiffs question whether the removals in this case were intended as removals for the "efficiency of the service." The removal notices, it appears, cited the statutory bar, 5 U.S.C. § 3328—not Chapter 75, Subchapter II and the "efficiency of the service" phrase—but the legislative history and regulations make clear that a removal because of a statutory bar *is* one for the "efficiency of the service," thereby triggering the opportunity—and obligation—to use the MSPB procedures and to seek judicial review in the Federal Circuit.

The plaintiffs' contrary suggestion rests on a misreading of *Department of the Navy v. Egan*, 484 U.S. 518 (1988). There, the Court relied on the ground given in a removal notice to conclude that the action was taken under the "efficiency of the service" standard and *not* on grounds of national security. *Id.* at 522 & n.4, 523. A national security removal is explicitly exempted from all "other statutes" and

review is narrowly limited. 5 U.S.C. § 7532; *see id.* § 7512(A) (exempting a section 7532 removal); *Egan*, 484 U.S. at 525–26. Here, no such statutory exemption applies, and the notice merely particularizes the "efficiency of the service" basis for the removal.

Fourth, the MSPB has suggested that a person who was wrongly hired in the face of an absolute statutory bar was never an "employee" at all because the appointment was void *ab initio*, and therefore, when the error is discovered, the person removed is not a former "employee" who can invoke the CSRA. *E.g.*, *Hope v. Dep't of the Army*, 108 M.S.P.R. 6, 9 (2008) (citing cases). This "reasoning," *see Travaglini v. Dep't of Educ.*, 18 M.S.P.R. 127, 132–37 (1983), *aff'd as modified*, 23 M.S.P.R. 417 (1984), underlies statements by the Board, occasionally noted but not endorsed by the Federal Circuit,[3] that a removal because of an absolute statutory bar is outside the Board's authority under the CSRA because the employee should not have been hired in the first place.

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[3] In *Diamond v. U.S. Agency for International Development*, 108 F.3d 312 (Fed. Cir.1997), the Federal Circuit mentioned the MSPB assertion, without passing on its validity, saying only that it did not apply to the case at hand. *Id.* at 316. In *Daneshpayeh v. Department of the Air Force*, No. 93–3476, 1994 WL 18964 (Fed. Cir. Jan. 26, 1994) (per curiam)—an unpublished, non-precedential decision, see Fed. Cir. R. 32.1, 36—the Federal Circuit affirmed an MSPB decision dismissing an appeal based on the supposed rule, but the court noted that the removed person took "no issue with the Board's recital of the applicable law" *id.* at *2, and suggested doubts as to the "Board's boiler-plate labeling of its decision as based on a 'lack of jurisdiction,' " *id.* at *2 n.4.

This is not the approach taken by modern courts in construing remedial statutes, and the government should be embarrassed ever to have taken advantage of such question begging rhetoric. The plaintiffs in this case were hired by the federal government, served (in some cases for many years) as its employees, exercised official authority, and were then terminated. The idea that Congress would implicitly exclude them from the category of former "employees" entitled to seek redress under the CSRA—if and to the extent that their removal was outside a statutory bar or that the bar was itself unconstitutional—beggars belief.

The CSRA governs "removals"; nothing in its language suggests that a case involving a statutory bar follows a different route; and the legislative history already described refutes any such suggestion. Of course, *if* the employee comes within the statutory bar *and* the statutory bar is constitutional, the discharged employee will not get reinstated; but the proper outcome should be a decision denying reinstatement on the merits. Thus, the statutory route gives the plaintiff a full opportunity to present both questions to the Federal Circuit, which is an Article III court.

Fifth, this brings us at last to the question whether there is some implied exception to the exclusive CSRA remedy because the challenge in this case is a constitutional one sounding in equity or because it is a facial constitutional attack rather than an "as-applied" challenge. The Supreme Court has already ruled that *Bivens*-type constitutional claims for damages cannot bypass CSRA limitations, *Lucas*, 462 U.S. at 368; and as to equitable constitutional claims, there is

something of a circuit split,[4] but this circuit has been firm in treating the CSRA remedy as exclusive as to equitable constitutional claims as well.

Thus, this court held in *Berrios* that an employee fired by the government could not bring a due process claim and other facial and as-applied constitutional claims by an original action in the district court but had to follow the CSRA scheme through the MSPB into the Federal Circuit. 884 F.2d at 31. Another decision in this circuit reaffirmed the general rule but found it inapplicable because the employee's classification excluded him from the CSRA remedy. *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 31–33 (1st Cir. 2001); *see also Irizarry v. United States*, 427 F.3d 76, 77–78 (1st Cir. 2005). None of our cases has adopted the distinction urged nor does it have any obvious basis in policy.

Constitutional claims are common in administrative proceedings—especially equal protection and procedural due process claims—and are part of the ordinary fodder of review in discharge cases. Often such claims are made along with factual claims denying the conduct alleged against the employee and statutory or rule-based claims as well. Congress' desire to consolidate employee removal in a single forum was

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[4] *Compare Dotson v. Griesa*, 398 F.3d 156, 179–82 (2d Cir. 2005), *and Lombardi v. Small Bus. Admin.*, 889 F.2d 961–62 (10th Cir. 1989), *with Mitchum v. Hurt*, 73 F.3d 30, 35–36 (3d Cir. 1996), *and Hubbard v. EPA*, 809 F.2d 1, 11 & n.15 (D.C. Cir. 1986), *vacated in part on other grounds, Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc) (per curiam). The Supreme Court has not resolved the question. *Whitman*, 547 U.S. at 513–14.

based on the action taken against the employee rather than the precise arguments made in contesting that action.

What matters in the end is whether the CSRA process can afford relief. The plaintiffs argue that a *facial* claim attacking the underlying statute is one for which the MSPB *cannot* grant relief to them and therefore the premise—that the CSRA remedy is exclusive where it applies—does not itself apply. And to show that there is no MSPB remedy, the plaintiffs point to statements by the MSPB itself that it, "as an administrative agency, is without authority to determine the constitutionality of Federal statutes." *Bayly v. OPM*, 42 M.S.P.R. 524, 525–26 (1990).[5]

But while the Board may be powerless to strike down the statute, the Federal Circuit on review of the Board may do so, 5 U.S.C. § 7703(c), and, if it agreed with the plaintiffs on the merits, remand to the Board to grant relief. *See Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 23–24 (2000); *Thunder Basin Coal Co.*, 510 U.S. at 215. Accordingly, the CSRA regime *does* provide an opportunity for the plaintiffs to obtain a full determination of their facial constitutional challenge. Indeed, even if the MSPB had the first word on the constitutional issue, it certainly would not have the last.

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[5] This self-denying ordinance, distinguishing this subset of constitutional challenges from all others, is widely repeated in the case law, *e.g.*, *Califano v. Sanders*, 430 U.S. 99, 109 (1977), although it is "not mandatory," *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994).

Plaintiffs object that the Federal Circuit has regularly said that its jurisdiction is coextensive with that of the MSPB as to the categories of cases that fall within the CSRA. *E.g., Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983). That proposition happens to be true as a general statement, but it was not made by the Federal Circuit in our context and would make no sense if it were: for in such cases the MSPB is limited only because of a doctrine that uniquely applies to administrative agencies and *not* to the Federal Circuit or any other Article III court.

The Federal Circuit has never said that it was powerless to act where a removal occurred and the underlying statute that prompted the removal was itself unconstitutional. On the contrary, that court has said that if a colorable constitutional claim were presented, it would have to address the issue. *See Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995) (discussing *Webster v. Doe*, 486 U.S. 592 (1988)); *Brockmann v. Dep't of the Air Force*, 27 F.3d 544, 546–47 (Fed. Cir. 1994) (same). And if it mistakenly held otherwise, the remedy would be on certiorari to the Supreme Court.

The substantive constitutional claims in this case are unpromising, given that one conflicts with governing Supreme Court precedent and the other ignores the fact that the plaintiffs were free to avoid the bar by timely registration. But the CSRA channels removals covered by the CSRA—and thus the plaintiffs' claims—to the Federal Circuit, *see Hall v. United States*, 617 F.3d 1313, 1316 (Fed. Cir. 2010); that principle serves an important purpose; the CSRA

provides a remedy for a meritorious facial challenge; and plaintiffs were obliged to use it.

The judgment of the district court is *vacated* and the case *remanded* for entry of a new judgment denying relief for lack of subject matter jurisdiction and without prejudice to the pursuit of remedies under the CSRA to the extent that they may be available at this late date. Each side shall bear its owns costs on this appeal.

It is so ordered.

STAHL, *Circuit Judge*, concurring.

I concur in the ultimate result of this case, but not in the route taken in reaching it. I would find jurisdiction to consider the plaintiffs' claims, but hold that they fail as a matter of law.

I. Jurisdiction

The majority reaches a reasoned conclusion, but I believe it falls short in considering fully the question of whether there is an applicable exception to the CSRA's preclusive effect. To be sure, the majority disposes of the plaintiffs' arguments regarding constitutional challenges generally and facial attacks specifically. It does not, however, take head-on the issue of whether federal district court jurisdiction remains intact if the CSRA does not afford meaningful review to the plaintiffs' colorable constitutional claims that sound in equity.[1] Because I find that the plaintiffs' claims would

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[1] The plaintiffs seek equitable relief in the form of a declaratory judgment that § 3328 and the Military Selective

be unreviewable under the CSRA's remedial scheme, I would hold that federal district court jurisdiction exists, just as our sister circuits have done in comparable cases. *See Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1034–39 (9th Cir. 2007); *Mitchum v. Hurt*, 73 F.3d 30, 34–36 (3d Cir. 1995); *Hubbard v. EPA*, 809 F.2d 1, 11–12 (D.C. Cir. 1986), *vacated in part on other grounds, Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988) (en banc) (per curiam).

As set forth in 28 U.S.C. § 1331, "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." The plaintiffs' claims arise under the Constitution, namely, the Bill of Attainder Clause in Article I, Section 9, and the Due Process Clause of the Fifth Amendment, which implicitly guarantees equal protection. *See Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). The question, then, is whether the CSRA divested the federal district court of its jurisdiction conferred by § 1331. *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006).

As explained by the majority, Congress enacted the CSRA in 1978 as a means to "'comprehensively overhaul[ ] the civil service system.'" *United States v. Fausto*, 484 U.S. 439, 443 (1988) (quoting *Lindahl v. OPM*, 470 U.S. 768, 773 (1985)). Prior to the CSRA, different employees were afforded different processes of review upon an adverse employment action,

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Service Act are unconstitutional; an injunction prohibiting the enforcement of § 3328; reinstatement to their agency positions; and back pay, benefits, and attorneys' fees.

resulting in both federal court and administrative appeals with "wide variations" among decisions. *Id.* at 444–45. Congress sought to streamline these varied decisions by funneling federal employee personnel actions through the CSRA's administrative process. *Id.* at 445.

Although the CSRA does not explicitly prohibit plenary actions in federal district court, the Supreme Court has interpreted the statute to have far-reaching preclusive effect. In *Bush v. Lucas*, 462 U.S. 367 (1983), it held that a federal-employee plaintiff whose demotion allegedly violated the Constitution could not sue for damages, even though, assuming the violation occurred, his remedies under the CSRA would not fully compensate him for the harm he suffered. Five years later, in *United States v. Fausto*, 484 U.S. 439, it found that the CSRA prevented a plaintiff from initiating suit in federal court for statutory and regulatory violations, even though the plaintiff was afforded no administrative review under the statute.

Despite this line of precedent, the Supreme Court has consistently found exceptions to the foreclosure of judicial review for colorable constitutional claims sounding in equity, absent clear congressional intent to the contrary. The same year it decided *Fausto*, it also decided *Webster v. Doe*, 486 U.S. 592 (1988), in which a plaintiff sought equitable relief when challenging on both statutory and constitutional grounds his termination from the CIA due to his homosexuality. The Court found the statutory claims unreviewable, but it rejected the government's argument that the constitutional claims were as well, holding:

> [W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear.... We require this heightened showing in part to avoid the "serious constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.

486 U.S. at 603 (quoting *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)); *see* also *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) (finding federal question jurisdiction for plaintiffs' constitutional challenges despite comprehensive immigration statute due to lack of meaningful judicial review under statute and absence of clear congressional language mandating preclusion); *Johnson v. Robison*, 415 U.S. 361, 373–74 (1974) (holding that statute prohibiting judicial review of decisions by the administrator of Veterans Affairs did not provide "the 'clear and convincing' evidence of congressional intent required by this Court before a statute will be construed to restrict access to judicial review" of constitutional claims (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967))).

Because I find that the CSRA's remedial scheme does not afford the plaintiffs meaningful review of their colorable constitutional claims for equitable relief, I would hold that the statute does not bar the present action and the plaintiffs may seek relief in federal district court.

The MSPB is a creation of statute, and its jurisdiction is limited. *See* 5 U.S.C. § 7701(a).

Notwithstanding the question of whether the MSPB has the power to rule on constitutional issues, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994), it is undisputed by the parties that the MSPB cannot adjudicate claims premised on removals due to an "absolute statutory prohibition" to appointment. *See, e.g., Hope v. Dep't of the Army*, 108 M.S.P.R. 6, 9 (2008); *Lovoy v. Dep't of Health & Human Servs.*, 94 M.S.P.R. 571, 586 (2003); *Daneshpayeh v. Dep't of the Air Force*, 57 M.S.P.R. 672, 676 (1993), *aff'd*, No. 93–3476, 1994 U.S. App. LEXIS 14360, 1994 WL 18964 (Fed. Cir. Jan. 26, 1994) (unpublished) (per curiam); *Travaglini v. Dep't of Educ.*, 18 M.S.P.R. 127, 132 (1983), *aff'd as modified*, 23 M.S.P.R. 417, 419–20 (1984).

Section 3328 is an absolute prohibition to appointment because an individual who knowingly and willfully fails to register with the Selective Service System is barred from all executive agency employment, and he must be terminated if currently employed. *See* 5 U.S.C. § 3328; 5 C.F.R. §§ 300.701–.707. The MSPB consistently dismisses appeals related to terminations pursuant to § 3328 on these grounds, a position the government regularly advances before the Board and on which it succeeded in the MSPB appeal by Mr. Elgin, a plaintiff in this matter. *E.g.*, *Charner v. OPM*, No. PH–3443–08–0601–I–2, 2009 M.S.P.B. LEXIS 1296, at *10–11 (Mar. 6, 2009) (unpublished); *Whitfield v. Dep't of Interior*, No. DC–0752–09–0094–I–1, 2008 M.S.P.B. LEXIS 6910, at *4, 7 (Dec. 23, 2008) (unpublished); *Rivera v. Dep't of Veterans Affairs*, No. NY–0752–08–0137–I–1, 2008 M.S.P.B. LEXIS 2056, at

*7 (Mar. 31, 2008) (unpublished); *Elgin v. Dep't of Treasury*, No. PH–0752–08–0004–I–1, 2007 M.S.P.B. LEXIS 7502, at *9 (Nov. 16, 2007) (unpublished).

Indeed, the MSPB has often deemed frivolous the assertion that it has jurisdiction over cases contesting removals pursuant to § 3328. *See, e.g.*, *Whitfield*, 2008 M.S.P.B. LEXIS 6910, at *1; *Clarke v. OPM*, No. DA–3443–07–0538–I–1, 2007 M.S.P.B. LEXIS 7101, at *1 n.1 (Dec. 17, 2007) (unpublished); *Belmares–Avalos v. OPM*, No. CH–300A–07–0351–I–1, 2007 M.S.P.B. LEXIS 4900, at *1 (May 9, 2007) (unpublished). Moreover, the regulations promulgated by OPM are entitled "Statutory Bar to Appointment of Persons Who Fail to Register Under Selective Service Law," and they state that administrative review beyond OPM's determination is prohibited. 5 C.F.R. §§ 300.701–.707; *id.* at .706(c).[2]

Because the MSPB has routinely stated that it lacks jurisdiction to hear the plaintiffs' claims on the merits, it appears to me that the Federal Circuit is without jurisdiction to do so as well. The Federal Circuit's jurisdiction is derivative of the MSPB's

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[2] The majority states that, to the extent that the MSPB would have found that it lacked jurisdiction to hear the plaintiffs' claims because the plaintiffs were terminated pursuant to an absolute statutory prohibition to appointment, the MSPB would be wrong because the doctrine has never been endorsed by the Federal Circuit and is illogical. I believe that the majority oversteps in reaching this conclusion. First, as cited above, the MSPB routinely holds that it cannot hear appeals contesting removals based on absolute statutory prohibitions to appointment, and this precedent appears firmly established.

jurisdiction, and it is problematic whether the Federal Circuit has the ability to decide matters beyond that of the Board. *See Perez v. Merit Sys. Prot. Bd.*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits of Perez's challenge ... were not before the MSPB for decision; nor are they before us."); *Carroll v. Dep't of Health & Human Servs.*, 703 F.2d 1388, 1390 (Fed. Cir. 1983) ("'[W]ith respect to cases brought under [5 U.S.C. §] 7701, the scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the Board.'" (quoting *Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir.1983))).

The majority places great faith in its presumption that the Federal Circuit would either find the MSPB competent to review the plaintiffs' claims and remand for a decision on the merits, or that it would look beyond its own jurisdictional constraints to reach the constitutional issues itself. The evidence to support these assertions, however, is elusive. First, although no plaintiff, in this suit or others, who was removed under § 3328 has ever sought Federal Circuit review of the MSPB's decision to dismiss for lack of jurisdiction, the case law and regulations cited above suggest that such efforts would be futile. Time and again the MSPB has dismissed these cases, claiming that it is unable to grant relief, and an appeal to the Federal Circuit seems almost certain to result in a simple affirmance. *See Daneshpayeh*, 1994 U.S. App. LEXIS 14360.

Second, the Federal Circuit has never reached beyond the limits of the MSPB to hear the merits of a claim otherwise barred from review. In only one

instance has it hypothesized the possibility, and never before has it acted on the idea. *See Brockmann v. Dep't of the Air Force*, 27 F.3d 544, 546–47 (Fed. Cir. 1994) (acknowledging Supreme Court precedent supporting review of colorable constitutional claims otherwise barred, but finding precedent inapplicable because plaintiffs' claims unreviewable by the MSPB were not colorable). Indeed, when the Federal Circuit did confront a plaintiff covered by the CSRA who asserted constitutional claims that were beyond MSPB review, it affirmed the dismissal of his suit for lack of jurisdiction, rather than providing a forum for his constitutional claims. *Hubbard v. Merit Sys. Prot. Bd.*, 319 Fed. Appx. 912 (Fed. Cir. 2009) (unpublished). Such case law provides little comfort that the plaintiffs in this matter would fare any better.[3]

To be sure, administrative boards have been declared competent to review constitutional issues otherwise perhaps beyond their scope. *See Shalala v. Ill. Council on Long–Term Care, Inc.*, 529 U.S. 1, 20–24

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[3] The majority suggests that were the Federal Circuit not to address a colorable constitutional claim, the remedy would be on certiorari to the Supreme Court and not via a plenary federal district court action. I disagree with the majority because the doctrine obliging review of constitutional claims is relevant only when review is otherwise unavailable. Here, it appears that review under the CSRA's administrative scheme is foreclosed, and so I do not see why the federal district court is not the proper forum to review the claims. Indeed, the several circuits that have invoked this doctrine in the context of the CSRA have done so despite the Federal Circuit's ostensible ability to do the same. *See Stone*, 502 F.3d at 1034–39; *Mitchum*, 73 F.3d at 34–36; *Hubbard*, 809 F.2d at 11–12.

(2000) (interpreting Medicare statute to provide administrative review of constitutional claims); *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995) (finding administrative board competent to review constitutional due process claim). In these instances, however, the administrative schemes at issue expressly precluded federal district court jurisdiction, and, therefore, would leave the constitutional claims without any forum were the boards unable to review them. *See Shalala*, 529 U.S. at 5, 8, 10 (finding Medicare Act to prohibit expressly federal-question jurisdiction); *Riggin*, 61 F.3d at 1570 (finding Government Employee Rights Act to prohibit expressly the commencement of judicial proceedings).

The CSRA contains no such clear prohibition of original federal court actions. Chapter 75 of the CSRA allows an agency to remove an employee "only for such cause as will promote the efficiency of the service," and upon such action, the employee "is entitled to appeal to the Merit Systems Protection Board." 5 U.S.C. § 7513(a), (d). Nowhere does the statute indicate explicitly that a plaintiff may not challenge his termination by raising colorable constitutional claims in federal court.[4]

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[4] To the extent that the majority opinion suggests that the plaintiffs' claims are not colorable, I disagree. There is a difference between colorable and meritorious claims, and although I would dismiss the plaintiffs claims as a matter of law, I do not find them lacking in "potential validity," *see Makieh v. Holder*, 572 F.3d 37, 42 (1st Cir. 2009). The district court's initial holding on the bill of attainder claim demonstrates as much.

Our sister courts in the Ninth, Third, and D.C. Circuits have held similarly and allowed federal employees to bring constitutional claims in district court actions seeking equitable relief. *See Stone*, 502 F.3d at 1034–39 (holding CSRA did not preclude judicial review of plaintiffs' First Amendment constitutional claims for equitable relief when plaintiffs had no remedy under the statute); *Mitchum*, 73 F.3d at 34–36 (finding CSRA and comparable statutes did not preclude federal district court review of plaintiffs' constitutional claims for injunctive and declaratory relief because CSRA not sufficiently clear to restrict federal power to grant equitable relief for constitutional violations); *Hubbard*, 809 F.2d at 11–12 & n. 15 (holding federal district court had jurisdiction over First Amendment claim because the "CSRA does not preclude federal employees from seeking equitable relief against agencies for allegedly unconstitutional personnel actions"); *Spagnola*, 859 F.2d at 229–30 ("[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights.").

The Eleventh, Seventh, and Fourth Circuits have expressly avoided the question of whether the CSRA forecloses equitable relief for colorable constitutional claims; indeed, the Eleventh and Fourth Circuits have distinguished or questioned their prior precedent that suggests preclusion. See *Hardison v. Cohen*, 375 F.3d 1262, 1263, 1266–69 (11th Cir. 2004) (acknowledging serious question left unresolved as to whether the CSRA precludes equitable relief for constitutional challenges to terminations and distinguishing prior

precedent in *Stephens v. Dep't of Health & Human Servs.*, 901 F.2d 1571 (11th Cir. 1990), based on availability of review and type of remedy sought); *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (avoiding issue of whether CSRA precludes equitable relief for colorable constitutional claims because claim was not colorable); *Bryant v. Cheney*, 924 F.2d 525, 527–28 (4th Cir. 1991) (declining to address continued vitality of *Pinar v. Dole*, 747 F.2d 899 (4th Cir. 1984), in light of *Webster* and circuit split on issue). Indeed, the Supreme Court indicated the significance of this issue in *Whitman v. Department of Transportation*, 547 U.S. 512, 514 (2006), remanding for a determination as to whether the CSRA removed federal question jurisdiction over constitutional challenges.

I acknowledge that some of our own precedent and unpublished decisions along with decisions in the Second and Tenth Circuits[5] suggest that the CSRA bars all federal actions related to civil service employment, but those cases are distinguishable. They did not involve the absence of meaningful administrative remedies, *Dotson v. Griesa*, 398 F.3d 156, 171–72, 182 (2d Cir. 2005) (noting lack of CSRA remedies but available relief through comparable statutory scheme); *Harvey v. U.S. Postal Serv.*, No. 94–1729, 1995 U.S. App. LEXIS 9447 (1st Cir. Apr. 25,

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[5] Unpublished opinions from this court and opinions from other courts act as persuasive authority and are not binding precedent. *See* Fed. R. App. P. 32.1; 1st Cir. R. 32.1.0(a); *United States v. Stepanian*, 570 F.3d 51, 57 n.10 (1st Cir. 2009).

1995) (unpublished) (CSRA remedies available); *Berrios v. Dep't of the Army*, 884 F.2d 28, 29–30 (1st Cir. 1989) (CSRA remedies available);[6] equitable claims, *Harvey*, 1995 U.S. App. LEXIS 9447, at *1–2; *Roth v. United States*, 952 F.2d 611, 613 & n.2 (1st Cir. 1991); or colorable constitutional challenges, *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 31, 33 (1st Cir. 2001);[7] *Harvey*, 1995 U.S. App. LEXIS 9447, at *2; *Desmond v. Dep't of Defense*, No. 92–2201, 1993 U.S. App. LEXIS 5195, at *11–12 (1st Cir. Mar. 19, 1993) (unpublished); or they lacked meaningful analysis, *Lombardi v. Small Bus. Admin.*, 889 F.3d 959, 961–62 (10th Cir. 1989).

Consistent with *Stone*, *Mitchum*, and *Hubbard*, and the shift within the circuits, I would hold that for an administrative scheme to foreclose a plenary federal district court action seeking equitable relief and involving colorable constitutional claims, congressional intent must be clear. The CSRA does not meet this standard. I would then find that the plaintiffs' claims are afforded no meaningful review under the CSRA and, therefore, their claims are reviewable in federal district court.

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[6] Although the majority claims that *Berrios* definitely answers our present matter, the case is distinct. In *Berrios*, the plaintiff was afforded and took advantage of available CSRA remedies, and so the rationale for district court jurisdiction would not apply. Here, however, the plaintiffs have no statutory remedies.

[7] Indeed, in *Pathak* we acknowledged that, despite the CSRA's expansive reach, we might have jurisdiction to review the plaintiffs claims, were they colorable. 274 F.3d at 33.

II. The Merits

Having found jurisdiction, I would dismiss the plaintiffs' claims on the merits.

A. Bill of Attainder

The plaintiffs assert that § 3328 is an unconstitutional bill of attainder since it legislatively punishes men age twenty-six and older who failed to and can no longer register with the Selective Service System because it prohibits their employment with an executive agency. They assert that the statute satisfies the requirements of a bill of attainder by identifying a class of men based on immutable past conduct and operating as a punishment without trial. I disagree.

Article I, Section 9, Clause 3 of the United States Constitution reads: "No Bill of Attainder or ex post facto Law shall be passed." With this clause the Framers "sought to prohibit the ancient practice of the Parliament in England of punishing without trial 'specifically designated persons or groups.'" *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 847 (1984) (quoting *United States v. Brown*, 381 U.S. 437, 447 (1965)). The constitutional provision safeguards the notion of separation of powers by protecting against trial by legislature. *Brown*, 381 U.S. at 442. Historically, bills of attainder were acts sentencing to death one or more specific persons, although the Supreme Court has read the clause to also outlaw what were known as bills of pains and penalties, which imposed less severe punishments. *Id.* at 441; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867). Targeted parties were typically those "who

had attempted, or threatened to attempt, to overthrow the government." *Brown*, 381 U.S. at 441.

The Supreme Court has struck down statutes on bill of attainder grounds only five times in the nation's history. *See Cummings*, 71 U.S. 277 (targeting Confederate sympathizers); *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867) (same); *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234 (1873) (same); *United States v. Lovett*, 328 U.S. 303 (1946) (targeting "subversives"); *Brown*, 381 U.S. 437 (targeting Communist Party members). For a statute to qualify as a bill of attainder it must: (1) specify the affected person or group, (2) impose punishment by legislative decree, and (3) dispense with a judicial trial. *See Selective Serv. Sys.*, 468 U.S. at 847. Because I would find that § 3328 does not specify an identifiable group or impose punishment, I would hold that the statute is not a bill of attainder.

1. **Specification**

Typical bills of attainder evince specification by naming the person to be punished. The Supreme Court has also recognized specification when legislation describes individuals "in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of the U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961); *see also Cummings*, 71 U.S. 277 (identifying individuals by past affiliation with Confederacy); *Ex Parte Garland*, 71 U.S. 333 (same). In contrast, statutes of general applicability that focus on prospective conduct have withstood challenges on bill of attainder grounds. *See Brown*, 381 U.S. at 446, 461;

see e.g., *Selective Serv. Sys.*, 468 U.S. at 848–51 (finding statute prospective and therefore not bill of attainder); *Communist Party*, 367 U.S. at 86–87 (finding statute not bill of attainder because it did not attach to "past and ineradicable actions," but rather "turn[ed] upon continuingly contemporaneous fact").

Section 3328 does not meet the specification requirement to constitute a bill of attainder because it does not identify individuals for legislatively imposed punishment based on irreversible past acts. Rather, the statute is entirely prospective in nature. President Carter's Proclamation issued on July 2, 1980, dictated that men born on or after January 1, 1960, are required to register with the Selective Service System. Those born in the years 1960, 1961, and 1962 had six specified days to register. All men born during or after 1963 have thirty days both before and after their eighteenth birthdays to comply. Proclamation No. 4771.

Section 3328 became effective on November 8, 1985. On this date, the oldest person subject to its provisions would have been twenty-five. Thus, even if an individual had failed to satisfy timely the dictates of President Carter's Proclamation, under § 3328, he still had the opportunity to register with the Selective Service System and avoid disqualification from federal employment. *See* 5 C.F.R. §§ 300.704(b), 300.705(c); *cf. Selective Serv. Sys.*, 468 U.S. at 849. As such, § 3328 does not identify any individuals "'ineluctably designated by the legislature' for punishment" because all men can comply prospectively. *See Selective Serv.*

Sys., 468 U.S. at 847 (quoting *Communist Party*, 367 U.S. at 87).

The Supreme Court found similarly in *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. at 849–51, when it held that § 12(f) of the Military Selective Service Act, which denies federal financial assistance to male students who fail to register for the draft, did not meet the specification requirement to constitute a bill of attainder.[8] Similar to § 3328, § 12(f) was enacted before any men subject to it would have been too old to register with the Selective Service System. Because § 12(f)'s implementing regulations permitted nonregistrants to register late, meaning, after the timeline delineated in Proclamation 4771, § 12(f) was not retrospective.

The plaintiffs counter that § 3328 is nevertheless a bill of attainder because it penalizes an easily identifiable group of men age twenty-six and older who are no longer eligible to register for the draft. They argue that Supreme Court precedent and historical parliamentary acts demonstrate that legislation qualifies as a bill of attainder even when punishment occurs post-enactment and is conditioned on future behavior. They advance that § 3328 is such a bill because it makes termination contingent upon the subsequent act of failing to register for the draft before turning twenty-six. Relatedly, they also assert that § 3328 should be evaluated as a bill of attainder at the

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[8] The Supreme Court also determined that the statute did not meet the punishment requirement. As explained below, I would hold that neither does § 3328.

time of enforcement rather than the time of enactment, and that under such analysis, the statute meets the specification element because men currently age twenty-six and older who did not register for the draft represent an easily ascertainable group.

The plaintiffs' arguments miss the mark. To be sure, the Supreme Court has held that a statute conditioning punishment on future behavior may still constitute a bill of attainder, but this assertion is irrelevant. Such statutes have met the specificity requirement because they have identified specific individuals or groups based on prior acts, irrespective of also providing these individuals with a means to escape punishment through some future performance. See *Brown*, 381 U.S. at 442 (highlighting that statutes meet specification by designation of affected individuals, even if they provide escape clauses).

For example, in *Cummings v. Missouri*, 71 U.S. 277, the Supreme Court found invalid a Missouri constitutional amendment that prohibited people from engaging in certain professions unless they stated under oath that they had not given aid or comfort to the Confederacy.[9] Although individuals could arguably escape punishment by performing the oath,[10] the

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[9] The Constitution extends the prohibition of bills of attainder to the states. U.S. Const. art. I, § 10, cl. 1 ("No State shall ... pass any Bill of Attainder....").

[10] The Supreme Court has noted the elusiveness of escaping punishment under the Missouri amendment at issue in *Cummings*. In effect, prior Confederate sympathizers could not evade the employment bar because their only options were to abstain from the oath and lose their livelihood, or take the oath

statute was still a bill of attainder because it identified the affected group based on immutable past conduct, prior sympathy and aid to the Confederate army. *Id.* at 318 ("In the first place, [the amendment] is retrospective; it embraces all the past from this day."); see also *Ex Parte Garland*, 71 U.S. at 377 (involving federal statute directed at Confederates that contained an escape clause and was ultimately found to be a bill of attainder). Section 3328, however, does not identify individuals in this manner because it is not directed at people who committed prior acts. Rather, it is a broadly drawn statute of general applicability directed at prospective conduct and affecting all men regardless of their past actions, political affiliations, or ideological beliefs.

With respect to the plaintiffs' insistence that the court evaluate § 3328 at the time of enforcement rather than at the time of enactment, I would reject it. A statute meets the specification element if it identifies individuals by name or by description of prior conduct so that it "operates only as a designation of particular persons." *Communist Party*, 367 U.S. at 86. A statute of general applicability that affects individuals only upon enforcement is not a bill of attainder; it is simply an example of the quintessential legislation that the Constitution tasks Congress with creating. See *Brown*, 381 U.S. at 461.

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and perjure themselves. *See Selective Serv. Sys.*, 468 U.S. at 848. To the extent that the plaintiffs analogize the Missouri amendment to § 3328 in that both provide "escape clauses," § 3328 does not present the double bind at issue in *Cummings* since men subject to § 3328 can avoid punishment through lawful actions.

2. Punishment

Even if § 3328 fulfilled the specificity element, I would still find that it does not constitute a bill of attainder because it does not inflict punishment. Courts evaluate whether a statute satisfies the punishment element for bill of attainder purposes by considering: (1) whether the statute falls within the historical meaning of legislative punishment; (2) whether, in view of the type and severity of the burdens imposed, the statute reasonably can be said to further nonpunitive legislative purposes; and (3) whether the legislative record demonstrates a congressional intent to punish. *Selective Serv. Sys.*, 468 U.S. at 852 (citing *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 473, 475–76, 478 (1977)). "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" based on impermissible congressional motive. *Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Further, "[e]ach case [turns] on its own highly particularized context." *Id.* at 616.

Section 3328 does not satisfy any of these punishment queries. It is true that "a legislative decree of perpetual exclusion" from specific types of employment meets the historical understanding of a bill of attainder. *Ex parte Garland*, 4 U.S. at 377 (1867) (barring types of employment for Confederate sympathizers); *see Cummings*, 71 U.S. 277 (same); *Lovett*, 328 U.S. 303 (barring named individuals from federal employment); *Brown*, 381 U.S. 437 (barring Community Party members from positions within labor unions). But § 3328 does not act as a perpetual

exclusion to employment because all men have an opportunity to register for the draft. A statute that allows men to "'carry the keys of their prison in their own pockets' ... does not fall within the historical meaning of forbidden legislative punishment." *Selective Serv. Sys.*, 468 U.S. at 853 (quoting *Shillitani v. United States*, 384 U.S. 364 (1966)).

Also, it is reasonable to understand § 3328 as a means to further the nonpunitive goal of encouraging Selective Service System registration. The statute was enacted in conjunction with findings that detailed the importance of the draft registration program and an urging from Congress that the President "recognize ... the contribution of our young men to the success of the peacetime registration program." *See* Pub. L. No. 99–145 §§ 1621, 1622(a), 99 Stat. 583, 776–77 (1985). It also complements President Carter's directive to executive agencies to "cooperate and assist" in the draft registration requirements. Proclamation No. 4771. The conditioning of civil service employment on draft registration, then, acts as a "rational means to improve compliance," which is a legitimate nonpunitive objective. See *Selective Serv. Sys.*, 468 U.S. at 854.

Finally, I would not find the "clearest proof" from the congressional record that Congress intended § 3328 to act as a form of punishment. Admittedly, Senator Strom Thurmond, the statute's sponsor, deemed it "unpatriotic" to permit nonregistrants to enjoy the privileges and benefits of civil service positions. 131 Cong. Rec. S6627 (1985). These comments alone, however, do not suffice as "'unmistakable evidence of punitive intent which ... is required before a

Congressional enactment of this kind may be struck down.'" *Selective Serv. Sys.*, 468 U.S. at 855 n.15 (alterations in original) (quoting *Flemming*, 363 U.S. at 619); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history."). Little other legislative history of the statute exists, and what the record does contain suggests nonpunitive motives. Senator Sam Nunn, the only other senator who offered substantive remarks during debate on the legislation, lent his support to the statute, but underscored the importance of allowing a person to register late despite Proclamation 4771's mandates. 131 Cong. Rec. S6627. His concern for the ability of nonregistrants to correct their failure demonstrates the legislation's goal of encouraging compliance.

For these reasons, I would find that § 3328 is not a bill of attainder and affirm the dismissal of this claim.

B. Equal Protection

For their second constitutional claim, the plaintiffs contend that § 3328 and the Military Selective Service Act on which it is predicated violate equal protection as guaranteed by the Fifth Amendment because the statutes draw unlawful gender-based distinctions. The plaintiffs acknowledge that the Supreme Court has already evaluated the constitutionality of the Military Selective Service Act upon an equal protection challenge in *Rostker v. Goldberg*, 453 U.S. 57 (1981). They argue that *Rostker* is no longer good law, however, due to subsequent precedent from *United States v. Virginia*, 518 U.S. 515 (1996), which, they

posit, altered the legal standard governing equal protection claims, and due to dramatic changes in the roles of women in the military.

Because *Rostker* stands on all fours with the present matter, I would reject the plaintiffs' challenge. Despite changes in the military and the extent, if any, of *Virginia*'s impact on the equal protection standard as applied here, principles of stare decisis would mandate the finding that *Rostker* is controlling and that plaintiffs' claim are meritless. *See Agostini v. Felton*, 521 U.S. 203 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989))); *see also Tenet v. Doe*, 544 U.S. 1 (2005) (reversing Ninth Circuit because its holding was "quite wrong" and "contravene[d][ ] longstanding" Supreme Court precedent).

In *Rostker*, the Supreme Court held that the Military Selective Service Act does not violate equal protection by requiring men, but not women, to register for the draft. It noted that Congress is afforded due deference in matters involving national defense and the constitutionality of its enactments, and the extensive congressional record of the statute demonstrated that Congress made a "studied choice" in excluding women from the registration requirements. *Id.* at 64–69, 72–77. It then held that the statute was not an instance of unlawful gender discrimination. The

government had an important interest in raising and supporting armies, as detailed in Article I, Section 8 of the Constitution. *Id.* at 70–72. The gender classification excluding women from the draft was closely related to this interest because the purpose of registration was to facilitate a draft for combat troops, and women were ineligible for combat. *Id.* at 75–79. No part of *Rostker* has been overruled, and its holding would foreclose any review of the plaintiffs' claim.

To be sure, the current reality of the armed forces represents a marked shift from 1981, when *Rostker* was decided. According to the plaintiffs' complaint, more than 200,000 women presently serve in the United States military, and women now make up 15 percent of the armed forces, compared to 8.4 percent in 1980. Legislation enacted after the decision is *Rostker* permits women to serve on Navy combat ships and fly combat aircraft, and a new Navy policy will allow women to serve on submarines. *See* Pub. L. No. 103–160, § 541, 107 Stat. 1547, 1659 (1993) (repealing ban on assignment of women to combat ships); Pub. L. No. 102–190, § 531, 105 Stat. 1290, 1365 (1991) (repealing ban on women from serving on aircraft engaged in combat missions); Commander, Submarine Forces Public Affairs, *Navy Policy Will Allow Women to Serve Aboard Submarines,* navy.mil. (Apr. 29, 2010, 6:35 AM), http:// www.navy.mil/search/ display.asp?story_id=52954. Even more, the congressional Military Leadership Diversity Commission recently issued a final report urging Congress to allow women into male-only land combat units. *From Representation to Inclusion: Diversity Leadership for the 21st-Century Military,* Final Report

(Military Leadership Diversity Comm'n, Arlington, Va.) Mar. 15, 2011, at 71–74, 127, *available at* http://mldc.whs.mil/index.php/final-report.

Despite these developments, women are still precluded from ground combat positions. Further, Congress has demonstrated an acute awareness of the gender distinctions in draft registration requirements, and yet it has not amended the statute. *See, e.g.*, Pub. L. No. 109–163, § 541(a)(1), 119 Stat. 3136, 3251–52 (2006) (directing Secretary of Defense to provide advance notice of changes to ground combat policy along with "detailed analysis of legal implication of the proposed change with respect to the constitutionality of the application of the Military Selective Service Act to males only." (internal citation omitted)). Indeed, the House's Armed Service Committee took pains to explain that repeals to certain bans on women-in-combat positions should not be "construed as tacit committee concurrence in an expansion of the assignment of women to units or positions whose mission requires routine engagement in direct combat on the ground, or be seen as a suggestion that selective service registration or conscription include women." H.R. Rep. No. 103–200, pt. 2 (1993). In any event, it would not be for this court to determine what, if any, impact these developments had on the continued vitality of *Rostker*, a task left solely to the Supreme Court.

III. Conclusion

For the foregoing reasons, I concur in the judgment. I would find jurisdiction to hear the plaintiffs' claims but ultimately affirm their dismissal on the merits.

Michael B. ELGIN, Aaron Lawson, Henry Tucker and Christon Colby on behalf of themselves and similarly situated men throughout the United States, Plaintiffs,

v.

UNITED STATES of America, United States Department of the Treasury, and United States Department of the Interior, Defendants.

Civil Action No. 07-12391-DPW

United States District Court,
D. Massachusetts.

March 11, 2010.

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, District Judge.

The Plaintiffs are male U.S. residents who lost or were denied employment positions in federal agencies, pursuant to 5 U.S.C. § 3328, for having failed to register for military service with the Selective Service System as required by federal law. In a January 26, 2009 Memorandum and Order, I determined that 5 U.S.C. § 3328 was an unconstitutional bill of attainder. *Elgin v. United States*, 594 F.Supp.2d 133 (D.Mass.2009). The case is now before me on three motions: the motion by the Defendants to reconsider

the Court's bill of attainder determination, the Plaintiffs' motion for a preliminary injunction, and the Plaintiffs' motion to certify a class for purposes of Fed.R.Civ.P. 23. Because I will grant the Defendant's motion for reconsideration and dismiss the case, I do not address Plaintiffs' motions, which will be rendered moot.

I. BACKGROUND

The background of the case was recited in detail in the January 26, 2009 Memorandum, consequently I need offer only a brief discussion here. The Plaintiffs are male U.S. residents age twenty-six or older, each of whom was employed by a federal agency. Each lost his position as a result of failing to register with the Selective Service System. The Military Selective Service Act ("MSSA") requires every male resident between the ages of eighteen and twenty-six to register with the Selective Service, 50 App. U.S.C. § 453(a), while 5 U.S.C. § 3328 states that anyone who knowingly or willfully did not register shall be ineligible for employment with an executive agency. 5 U.S.C. § 3328.

The Plaintiffs' Amended Complaint has two counts, Count One alleging that § 3328 is an unconstitutional bill of attainder, and Count Two alleging that the male-only classification in the MSSA discriminates on the basis of sex, in violation of equal protection. In the January 26, 2009 Memorandum, I dismissed Count Two from the case, *Elgin*, 594 F.Supp.2d at 145-48, but I granted the Plaintiffs' motion for partial summary judgment as to Count One, finding that 5 U.S.C. § 3328 operates as an unconstitutional bill of attainder for

those men who were no longer eligible to register with the Selective Service System. *Id.* at 138-45.

II. MOTION FOR RECONSIDERATION

The Defendants move for reconsideration pursuant to Fed.R.Civ.P. 59(e). The Defendants maintain that the determination was in error for two reasons: first, that this Court does not have subject matter jurisdiction over the Plaintiffs' claims; and second, even if there is subject matter jurisdiction, it was an error of law to find that 5 U.S.C. § 3328 was an unconstitutional bill of attainder. Necessarily, I must address subject matter jurisdiction before taking up again the merits of the bill of attainder claim.

A. Standard of Review

A district court has "substantial discretion and broad authority to grant or deny" a motion for reconsideration. *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 81 (1st Cir.2008). A court may grant a motion for reconsideration "where the movant shows a manifest error of law or newly discovered evidence." *Id.* at 81-82 (quoting *Kansky v. Coca-Cola Bottling Co. of New England*, 492 F.3d 54, 60 (1st Cir.2007)). A motion for reconsideration should also be granted if the court has "patently misunderstood" a party, or if the court made an error "not of reasoning but of apprehension." *Ruiz Rivera*, 521 F.3d at 82 (internal quotations omitted).

B. Subject Matter Jurisdiction

The Defendants now contend for the first time in their motion for reconsideration that this Court lacks subject matter jurisdiction to hear the Plaintiffs'

constitutional challenge to 5 U.S.C. § 3328.[1] The Defendants argue first that the Court of Appeals for the Federal Circuit has exclusive jurisdiction over the Plaintiffs' claims, under the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U.S.C.). Second, they argue that even if this Court could have jurisdiction in such matters, it cannot hear this case because the Plaintiffs have failed to exhaust their remedies under the CSRA.

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[1] Challenges to a court's subject matter jurisdiction may be raised at any time. Fed.R.Civ.P. 12(h)(3). Indeed, federal courts have a continuing duty to assure, even if acting *sua sponte*, that cases before them fall within the court's jurisdiction. *In re Recticel Foam Corp.*, 859 F.2d 1000, 1002 (1st Cir.1986). The Plaintiffs contend that the Defendants are judicially estopped from asserting that the Merit Systems Protection Board ("MSPB") has jurisdiction over the Plaintiffs' claims, given that in prior administrative proceedings the Defendants adopted the opposite legal stance. The principle of judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another case." *New Hampshire v. Maine*, 532 U.S. 742, 749-50, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 147 L.Ed.2d 164 (2000)). While the principle may be sound regarding other legal arguments, it is the tension with Rule 12(h)(3), which permits a Court to address the matter of subject matter jurisdiction "at any time." Fed.R.Civ.P. 12(h)(3). More fundamentally, as noted, a court has a continuing independent obligation to ensure that it is properly asserting jurisdiction over a matter. *In re Recticel*, 859 F.2d at 1002. Because the Defendants' motion is based on unaddressed questions of jurisdiction that have not been fully aired until now—albeit as a result of the Defendants' failure to raise them earlier—it is necessary to address them, notwithstanding contradictory positions taken before the MSPB.

1. **Federal Court Jurisdiction**

The Defendants' current position is that the Merit Systems Protection Board ("MSPB" or "Board") has jurisdiction to hear the Plaintiffs' claims under the CSRA, and that the Federal Circuit has exclusive jurisdiction to hear MSPB appeals, leaving this Court with no jurisdiction over the claims. Federal courts have jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Because the Plaintiffs' challenge arises under the Constitution, "[t]he question, then, is not whether [the CSRA] confers jurisdiction, but whether [the CSRA] removes the jurisdiction given to [certain] federal courts," *Whitman v. Dep't of Transportation*, 547 U.S. 512, 514, 126 S.Ct. 2014, 164 L.Ed.2d 771 (2006) (per curiam), and vests that jurisdiction elsewhere.

a. **Administrative Review Under the CSRA**

Congress passed the CSRA in 1978 "to replace the haphazard arrangements for administrative and judicial review of personnel action." *United States v. Fausto*, 484 U.S. 439, 444, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988). The CSRA "prescribes in great detail the protections and remedies applicable to [adverse personnel actions against federal employees], including the availability of administrative and judicial review." *Id.* at 443, 108 S.Ct. 668.

The CSRA has several provisions governing personnel actions taken by an administrative agency. Chapter 43 of the CSRA governs personnel actions based on unacceptable job performance. 5 U.S.C.

§ 4301. An agency may remove an employee for unacceptable performance, as long as the employee receives certain procedural protections. § 4303(a), (b). Chapter 23 forbids an agency from engaging in "prohibited personnel practice," such as unlawful discrimination, political coercion, nepotism, and retaliation against whistle-blowers. 5 U.S.C. § 2302(b). Under Chapter 75 of the CSRA, an agency may engage in the removal of an employee "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a); *see Fausto*, 484 U.S. at 445-46, 108 S.Ct. 668 (discussing the appeal provisions of Chapters 43, 23 and 75).

The MSPB is charged by statute with jurisdiction over some of the personnel actions taken under these Chapters. The MSPB "shall hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under [title 5], chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter." 5 U.S.C. § 1204. The MSPB has jurisdiction over appeals of Chapter 75 removals promoting the efficiency of the civil service. § 7513(d); 5 C.F.R. § 1201.3(a)(1), (2). The MSPB's administrative review, however, has some limitations. For instance, a right of appeal for Chapter 43 actions is not provided to every affected employee; only competitive service employee[2]

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[2] "Competitive service" employees are those for whom President nomination and Senate confirmation are not required, and who are not specifically excepted from the competitive service by statute or regulation. 5 U.S.C. § 2102.

and preference eligible members of the excepted service[3] can appeal decisions to the MSPB. 5 U.S.C. § 4303(e).

Once an eligible employee or applicant for employment has received an MSPB "final order or decision" that adversely affects him, he may then obtain judicial review of the decision. 5 U.S.C. § 7703(a)(1). A petition for review of an MSPB decision must be filed in the Federal Circuit, § 7703(b)(1), which has exclusive jurisdiction over appeals from final orders and decisions of the MSPB. 28 U.S.C. § 1295(a)(9).

b. Jurisdiction over the § 3328 Challenge

Federal regulations outline the procedure for determining whether an individual is eligible for agency employment under 5 U.S.C. § 3328. 5 C.F.R. § 300.705 (1999). If an individual is age twenty-six or over, and has failed to register, the agency provides the individual with written notice that he is ineligible for agency appointment unless his failure to register was neither knowing nor willful. 5 C.F.R. § 300.705(d)(1). The individual can then submit a written request for the Office of Personnel Management ("OPM") to decide whether failure to register was knowing and willful. *Id.* The applicant has the burden to prove that his failure to register "was neither knowing nor willful," otherwise

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[3] "Excepted service" refers to the classification of employees that has been excluded from the competitive service by regulation, 5 U.S.C. § 2103, and "preference eligible" employees are certain veterans and their close relatives. 5 U.S.C. § 2108.

the individual is deemed not eligible for federal employment. 5 C.F.R. § 300.705(e); § 300.706(a).

In this case, the Plaintiffs' challenge is not to the OPM determinations that their failure to register was knowing or willful, but rather to the constitutionality of the statute itself. Although the Defendants contend that the MSPB has jurisdiction to hear the Plaintiffs' constitutional challenge of 5 U.S.C. § 3328, they have not shown which provision of the CSRA creates this jurisdiction and I find none.

The Defendants seem to base their jurisdictional claim on Chapter 75, but a Chapter 75 personnel action is not involved in § 3328 ineligibility determinations. When the employing agencies and the OPM determined that the Plaintiffs were ineligible for federal employment for failure to comply with the Selective Service registration requirement, the decision was not for "such cause as will promote the efficiency of the service," 5 U.S.C. § 7513(a), and therefore does not fall under the Chapter 75 grant of MSPB jurisdiction. The ineligibility determination was based instead on an independent statutory ban not referenced in the CSRA. The OPM decision regarding § 3328 eligibility is made irrespective of the Plaintiffs' performance in agency positions or the agencies' efficiency demands. The Defendants suggest that Chapter 75 provides the MSPB with broad jurisdiction over all terminations or removals of federal employees, but this is not supported by the language of the statute, which limits removals under Chapter 75 to those that are designed to promote civil service efficiency.

Indeed, the regulations implementing § 3328 suggest the opposite of what the Defendants argue. The regulations provide that once the OPM issues its decision that an employee's failure to register with the Selective Service was knowing and willful, the determination is final, and "[t]here is no further right to administrative review." 5 C.F.R. § 300.706(c).

The Defendants extend their argument further, suggesting that the MSPB also has jurisdiction to determine as a threshold matter whether the action is in fact an appealable adverse action within the meaning of Chapter 75. In their Reply brief, the Defendants cite *Grosdidier v. Chairman, Broad. Bd. of Governors*, 560 F.3d 495 (D.C.Cir.2009), which noted that "the CSRA is the exclusive avenue for suit *even if the plaintiff cannot prevail in a claim under the CSRA*." *Id.* at 497 (emphasis added). To prevent an "end-run" of the CSRA, "we have told federal employees, 'what you get under the CSRA is what you get.'" *Id.* (internal citations omitted). In *Grosdidier*, however, the plaintiffs' claim was premised on the argument that the employing agency had acted arbitrarily and capriciously in failing to hire them. *Id.* at 496. Rather than making a facial constitutional challenge to a statute, the *Grosdidier* plaintiffs challenged the agency's individual personnel decisions, an issue that the CSRA was designed to encompass.

The MSPB itself has had occasion to address this question and has stated on more than one occasion that as a threshold matter, the Board has no jurisdiction to review an ineligibility determination under 5 U.S.C. § 3328. When the Plaintiff, Michael

Elgin, appealed his OPM determination to the MSPB, for example, the Board refused to hear the case concluding that "[b]ecause the statutory prohibition against the appellant's appointment is absolute" under § 3328, "the appellant has no entitlement to Board review of the agency's action at issue in this matter." *Elgin v. Dep't of the Treasury*, No. PH-0752-08-0004-I-1, 2007 MSPB LEXIS 7502, at *9 (Nov. 16, 2007); *see also Charner v. Office of Personnel Mgmt.*, No. PH-3443-08-0601-I-2, 2009 MSPB LEXIS 1296, at *10-11 (March 6, 2009) (finding that the MSPB lacked jurisdiction to review an OPM decision under § 3328); *Clarke v. Office of Personnel Mgmt.*, No. DA-3443-07-0538-I-1, 2007 MSPB LEXIS 7101, at *10-11 (Dec. 17, 2007) (same); *Belmares-Avalos v. Office of Personnel Mgmt.*, No. CH-300A-07-0351-I-1, 2007 MSPB LEXIS 4900 at *1-2 (May 9, 2007) (same).

One of the reasons for the MSPB's conclusion is that "the Board lacks authority to determine the constitutionality of a statute." *Elgin*, 2007 MSPB LEXIS 7502, at *10. It is "well-settled" that the MSPB "has no power to determine the constitutionality of a federal statute." *Hara v. Office of Personnel Mgmt.*, No. PH-0831-08-0099-I-2, 2008 MSPB LEXIS 6601, at *13 (Dec. 17, 2008); *see also Bayly v. Office of Personnel Mgmt.*, 42 M.S.P.R. 524, 525-26 (1990) ("The administrative judge correctly determined that the Board, as an administrative agency, is without authority to determine the constitutionality of Federal statutes."); *Brooks v. Office of Personnel Mgmt.*, 59 M.S.P.R. 207, 215 n. 7 (1993) (superceded on other grounds) (finding that the Board lacks authority to determine the constitutionality of a statute, but can

adjudicate a constitutional challenge to an agency's application of a statute).

The Defendants argue in their Reply brief that Congress may expressly remove a class of claims from the jurisdiction of the courts. They cite, for example, an immigration law provision eliminating Article III jurisdiction to review the decision to remove aliens who have committed certain criminal offenses. 8 U.S.C. § 1252(a)(2)(C). Neither this nor any other of the Defendants' examples, however, involve removing the power of Article III Courts to examine the constitutionality of a statute. That power remains with the judicial branch.

McNary v. Haitian Refugee Ctr., Inc., 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991) is instructive. *McNary* involved § 210(e) of the Immigration and Nationality Act, which created the administrative and judicial review provisions for an amnesty program for agricultural workers. *Id.* at 483, 111 S.Ct. 888. The plaintiffs made both constitutional and statutory challenges to the INS procedures, alleging violation of due process and of the Immigration Reform and Control Act of 1986. The Supreme Court determined that because the respondents did not seek "review on the merits of a denial of a particular application," the district court's federal question jurisdiction under 28 U.S.C. § 1331 "remains unimpaired." *Id.* at 494, 111 S.Ct. 888.

To be sure, in *Brown v. Dep't of Veterans Affairs*, 451 F.Supp.2d 273 (D.Mass.2006), Judge Saylor declined to permit the plaintiff to bypass the administrative scheme in raising an as-applied

challenge to a statute, 38 U.S.C. § 5313(a)(2), where Congress had empowered the Secretary of Veterans Affairs to "decide all questions of law and fact necessary to a decision." *Brown*, 451 F.Supp.2d at 279 (quoting 38 U.S.C. § 511(a)). In *Brown*, however, Judge Saylor also concluded that the courts did have jurisdiction to entertain a facial challenge to the statute, and proceeded to engage in an equal protection analysis to that end. *Id.* at 280-82.

Two cases cited by the Plaintiffs discuss MSPB jurisdiction, but they are not precisely on point. In *Dep't of the Navy v. Egan*, 484 U.S. 518, 108 S.Ct. 818, 98 L.Ed.2d 918 (1988), the employee was denied a required security clearance for his position with the Navy, and subsequently was removed from federal employment altogether when no other nonsensitive position could be found for him. *Id.* at 522, 108 S.Ct. 818. Both parties agreed that Egan was entitled to a hearing before the MSPB under 5 U.S.C. § 7513(d) on the issue of removal, but they disputed whether the MSPB had authority to review the merits of the Navy's underlying security clearance determination. *Id.* at 526, 108 S.Ct. 818. The crux of the Supreme Court's decision was that a security clearance determination was itself not an "adverse action" for purposes of Chapter 75; only the subsequent removal decision was found reviewable. *Id.* at 530, 108 S.Ct. 818. Unlike here, however, Egan sought review of a "sensitive and inherently discretionary judgment call," *id.* at 527, 108 S.Ct. 818, while the Plaintiffs in this case seek review of a statute's constitutionality.

In *Mullenberg v. United States*, 857 F.2d 770 (Fed.Cir.1988), the plaintiff challenged her termination from the Indian Health Service when it was discovered that she had been erroneously classified as an "Indian," which had given her a hiring preference pursuant to the Indian Reorganization Act, 25 U.S.C. §§ 461-479. The Federal Circuit denied her request for administrative and judicial review, finding that the plaintiff had not been discharged under Chapter 43 or 75, and therefore had no right to review under the CSRA. *Id.* at 772. Again, unlike this case, the plaintiff in *Mullenberg* had asserted no colorable constitutional claim. *Id.* at 773.

The Defendants have identified no statutory provision that would provide the MSPB with jurisdiction to hear the Plaintiffs' constitutional challenge to § 3328, and I can find no such provision in my reading of the CSRA. Because the MSPB lacked jurisdiction to hear the Plaintiffs' claims, the Federal Circuit likewise lacks exclusive jurisdiction to hear the Plaintiffs' suit. What remains is this Court's jurisdiction under 28 U.S.C. § 1331 to hear claims arising under the Constitution.

2. Exhaustion of Administrative Remedies

The Defendants' alternative jurisdictional argument is that even if this Court can review the Plaintiffs' constitutional challenge, it cannot do so until the Plaintiffs exhaust their administrative remedies. Under the doctrine of exhaustion of administrative remedies, "'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Woodford*

v. Ngo, 548 U.S. 81, 88-89, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006) (quoting *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)). The CSRA requires the exhaustion of administrative remedies in order to "prevent [ ] litigants from bypassing Congress' carefully crafted remedial scheme" and to "permit[ ] the federal agency to correct the violation or to explain its decision." *Irizarry v. United States*, 427 F.3d 76, 79 (1st Cir.2005).

According to the Defendants, once the MSPB determined that it lacked jurisdiction to hear Elgin's constitutional challenge to § 3328, Elgin was obligated to appeal the jurisdiction question to the Federal Circuit before turning to federal district court. The Defendants cite the *Elgin* MSPB opinion, which explicitly notified Elgin that he had a right to petition the Federal Circuit for review of the MSPB's decision. The notice, however, comes after the administrative judge's signature of the decision and appears to be little more than boilerplate appended through the cut and pass functionality of a word processor. I conclude the MSPB made no decision on the merits of Elgin's suit because it declined to find jurisdiction to do so. The MSPB did not undertake in any reasoned way to decide which, if any, Article III Courts would have jurisdiction to conduct review of the determination on the merits. Indeed, the MSPB could not direct jurisdiction to a particular court without express Congressional authorization.

The exhaustion requirement does not apply here for two reasons. First, there is no "prescribed administrative remedy," *Woodford*, 548 U.S. at 89, 126

S.Ct. 2378, for constitutional challenges to statutes affecting federal employment. The CSRA never mentions 5 U.S.C. § 3328, the treatment of facial constitutional challenges to federal statutes, or the treatment of employment decisions based on constitutional grounds not referenced in the CSRA.

The second reason is that "[t]raditional exhaustion principles ... include an exception for instances when resort to the administrative route is futile or the remedy inadequate." *Drinkwater v. Metro. Life Ins. Co.*, 846 F.2d 821, 826 (1st Cir.1988) (internal quotations omitted). The MSPB's repeated determinations that it lacks jurisdiction to review constitutional challenges to federal statutes illustrate that pursuing administrative relief was futile.

Of course, when a constitutional claim and statutory claim are intertwined, "a plaintiff must first pursue the administrative machinery." *Steadman v. Governor, U.S. Soldiers' and Airmen's Home*, 918 F.2d 963, 967 (D.C.Cir.1990). In *Steadman,* a remedy was available to the plaintiff both under the statutory scheme and under the Constitution. *Id.* at 964-65. Similarly, in *Egan*, 484 U.S. 518, 108 S.Ct. 818, appeal to the Federal Circuit was appropriate when the MSPB decided that it lacked jurisdiction to review the agency's underlying security clearance determination because it involved a mixed question of jurisdictional issues and a proper CSRA question under 5 U.S.C. § 7513. Here, however, there is no remedy under the statutory scheme because the Plaintiffs' only claim is a constitutional one.

C. Section 3328's Status as a Bill of Attainder Given the Statute's Specification

On the merits, the Defendants argue that, if this matter is properly before this Court, I should reconsider my determination that 5 U.S.C. § 3328 is an unconstitutional bill of attainder. I may do so "where the movant shows a manifest error of law ..." *Ruiz Rivera*, 521 F.3d at 81-82 (internal quotations omitted).

The Defendants state two grounds for reconsidering the constitutional analysis of the statute: the erroneous application of the "past conduct" element in bill of attainder analysis; and a misunderstanding of the OPM's treatment of the MSSA knowledge presumption. I reach only the "past conduct" element, which I find dispositive.

In the January 26, 2009 Memorandum and Order, I discussed the elements that must be demonstrated to show that Congress has enacted an unconstitutional bill of attainder. *Elgin*, 594 F.Supp.2d at 138-45. The main requirements are "specification of the affected persons, punishment, and lack of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group* ("*MPIRG*"), 468 U.S. 841, 847, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984).

When considering whether the statute targeted "past conduct," I looked at past conduct at the time that the employing agencies discovered the Plaintiffs' failure to register. *Id.* at 138-40. The Defendants now focus their argument more forcefully on the contention that the targeted persons' conduct must be past conduct at the time that the law is passed. To support

their position they cite *SeaRiver Maritime Financial Holdings v. Mineta*, 309 F.3d 662 (9th Cir.2002), which states that to determine whether a statute is a bill of attainder, the court looks to "whether the identity of the individual or class was 'easily ascertainable' *when the legislation was passed.*" *Id.* at 669 (emphasis added).

The contention is fundamental to this case because at the time § 3328 was passed in 1985, the Plaintiffs and all those who came within the scope of the statute were either too young to register, or in Elgin's case, young enough still to register before turning twenty-six. The statute therefore did not punish anyone when passed, because it applied only to men "born after December 31, 1959," 5 U.S.C. § 3328(a)(1), in other words, to men who had not yet reached age twenty-six.[4]

The Supreme Court has never explicitly held that in order for a law to be a bill of attainder, the affected parties must be "specified" or "easily ascertainable" at the time the legislation is passed. In fact, *SeaRiver* is the only case cited by the parties which research has shown to say so unambiguously. Yet looking more closely at the cases in which the bill of attainder prohibition was at issue and the history and purpose of the bill of attainder, it becomes clear that the targeted

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[4] It bears noting that anyone born on January 1, 1960 had only six weeks to register before being banned forever from federal employment. That circumstance, however, has no bearing on this case.

class must be "specified" at the time the legislation is enacted.

1. Bill of Attainder Case Law

While the case law, apart from *SeaRiver*, does not explicitly pinpoint the moment of "specification," those few cases in which the Supreme Court has held a statute to be an unconstitutional bill of attainder support the contention that the *sine qua non* of specificity is a class that is closed or fixed at the time of the law's enactment. The Court's earliest cases, *Cummings v. Missouri*, 71 U.S. (4 Wall) 277, 18 L.Ed. 356 (1866), and *Ex parte Garland*, 71 U.S. (4 Wall) 333, 18 L.Ed. 366 (1866), both concerned Civil War-era laws that made loyalty oaths a precondition to practicing certain professions, thereby effectively barring all those who had supported the Confederacy from those vocations. At the time the provisions were enacted, the affected persons were "specified" or "easily ascertainable" because their status as Confederacy sympathizers was irreversible. The law punished for conduct already passed; "no one who had served the Confederacy could possibly comply." *MPIRG*, 468 U.S. at 851, 104 S.Ct. 3348; *see also Pierce v. Carskadon*, 83 U.S. (16 Wall) 234, 21 L.Ed. 276 (1872) (striking down as bill of attainder a West Virginia law conditioning access to courts upon an oath like that of *Cummings* and *Garland*).

United States v. Lovett, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Court's next major attainder case, provides a classic example of specificity. The law at issue barred the government from paying the salaries of three named government employees

suspected to be Communist sympathizers. That is the prototypical fixed class; the employees were identified by name.

In *United States v. Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965), the Court voided as a bill of attainder a law that made it a crime for a member of the Communist Party to serve as an officer or employee of a labor union during the time of his membership or for five years afterward. Brown, a Communist, held an officer position in a labor union from 1959 to 1961, when he was criminally charged. As in the prior Supreme Court cases, those affected, Communist Party members, were "easily ascertainable" at the time the law was enacted in 1959. When the statute was passed, it punished Communist Party members for past conduct. As the briefing before the Supreme Court made clear, "[a]t no time between 1959, when the statute was enacted, and 1964 when the five-year period could have expired at its earliest, could Brown, by any 'voluntary alteration of [his] loyalties' or otherwise, have held union office without liability to criminal prosecution." Brief of Respondent at *52, *Brown*, 381 U.S. 437, 1965 WL 115596 (March 13, 1965) (quoting *American Communications Association v. Douds*, 339 U.S. 382, 414, 70 S.Ct. 674, 94 L.Ed. 925 (1950)). *Cf. MPIRG*, 468 U.S. at 851, 104 S.Ct. 3348 (persons affected by statute denying federal financial aid to students who failed to register for the draft not easily ascertainable because their status was not "irreversible").

Following the lead of the Supreme Court, lower courts have found unconstitutional specification only

when the affected parties were named or "easily ascertainable" at the time the statute was enacted. In the most common circumstances, the law has either singled out the targeted group by name, *see, e.g., Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 350 (2d Cir.2002) (finding that a New York statute ordering Consolidated Edison to refund certain costs to customers satisfied specificity requirement); *BellSouth Corp. v. FCC*, 162 F.3d 678, 684 (D.C.Cir.1998) (holding that provision limiting the ability of BellSouth operating companies to provide certain services met specificity requirement, although law was not bill of attainder for other reasons), or described the group "in terms of conduct, which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of the United States v. Subversive Activities Control Board*, 367 U.S. 1, 86, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961). *See, e.g., Foretich v. United States*, 351 F.3d 1198, 1217 (D.C.Cir.2003) (finding law whose applicability "depends on such a narrow set of circumstances that it applies to no known cases other than the [plaintiffs]" met specificity requirement); *Caudell v. City of Toccoa*, 153 F.Supp.2d 1371, 1379 (N.D.Ga.2001) (holding that law prohibiting city commission member from serving as a hospital board member is sufficiently specific where plaintiff is the only person in entire state affected and no other person had held both positions in twenty-five years).

Bill of Attainder case law reflects the principle that a law "specifies" the affected group "only if it defines a closed class of persons with some fixed characteristic—a class the entire membership of which could be known (at least in theory) by the legislators at

the moment when the law is enacted." Roderick M. Hills, Jr., *Is Amendment 2 Really A Bill of Attainder? Some Questions About Professor Amar's Analysis of Romer*, 95 MICH. L.REV. 236, 236-37 (1996). In other words, a statute unlawfully specifies under the Bill of Attainder prohibition when it "defines a closed class, a class with a membership that is permanently fixed when the class is defined, from which members can never exit and into which nonmembers can never enter, as a matter of law." *Id.* at 240.

Courts have found the hallmarks of Bill of Attainder specificity to be irreversibility and retrospectivity. A statute that defines affected persons based upon their past conduct creates an irreversible or fixed group. "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party*, 367 U.S. at 86, 81 S.Ct. 1357 (1961); *see also MPIRG*, 468 U.S. at 847, 104 S.Ct. 3348 (quoting *Communist Party*, 367 U.S. at 87, 81 S.Ct. 1357) ("When past activity serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment the Act may be an attainder."). An "indispensible element of a bill of attainder is its retrospective focus: it defines past conduct as wrongdoing and then imposes punishment on that past conduct." *Roe v. Farwell*, 999 F.Supp. 174, 193 (D.Mass.1998); *see also Consolidated Edison Co.*, 292 F.3d at 349 ("The retrospective focus of [the statute] is essential to our determination that the statute is a bill

of attainder."); *O'Bradovich v. Village of Tuckahoe*, 325 F.Supp.2d 413, 428 (S.D.N.Y.2004) ("A law is unconstitutional when it penalizes past actions that occurred before its passage and that cannot be undone....").

Conversely, courts have found "specificity" to be lacking in two situations: "when the challenged law is a law of general applicability, and when the law punishes a reversible condition." *O'Bradovich*, 325 F.Supp.2d at 427. Courts have consistently held laws that are prospective and general at the time of enactment to be constitutional. *See Dent v. State of West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889) (upholding West Virginia law requiring doctors to obtain a license before practicing); *Palmer v. Clarke*, 408 F.3d 423, 428, 433 (8th Cir.2005) (law "amend[ing] the marital privilege statute by rendering the privilege inapplicable in cases involving crimes of violence" not bill of attainder because "there is no way to determine which individuals were 'ineluctably designated' by [the law] for punishment"); *PTI, Inc. v. Philip Morris Inc.*, 100 F.Supp.2d 1179, 1199 (C.D.Cal.2000) (statute "does not contain the requisite specificity" where "[a]pplication of the statute depends entirely on an entity's prospective choice of conduct."). Indeed, passing general and prospective laws is exactly a legislature's function. *Brown*, 381 U.S. at 446, 85 S.Ct. 1707 (quoting *Fletcher v. Peck*, 10 U.S. 87, 6 Cranch 87, 3 L.Ed. 162 (1810)) ("'It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.'").

Returning to § 3328, it becomes apparent that under the case law, it is not a bill of attainder because it does not meet the specification requirement. The statute became effective on November 8, 1985, and its prohibition applies to men "born after December 31, 1959." Therefore, at the time of its passage, the law did not apply to anyone over the age of twenty-six. There was no closed or specified class at time of its enactment; one could voluntarily enter or exit the affected class on November 8, 1985. The statute's application was "made to turn upon continuingly contemporaneous fact," *MPIRG*, 468 U.S. at 851, 104 S.Ct. 3348 (quoting *Communist Party*, 367 U.S. at 87, 81 S.Ct. 1357). In other words, the statute as enacted was both general and prospective in nature.

2. History and Purpose of the Bill of Attainder

The history and purpose of the bill of attainder supports the principle that a bill of attainder must "specify" the affected persons at the time it is enacted. The historical bill of attainder was an act by British Parliament that sentenced a specific person or group to death. *United States v. Brown*, 381 U.S. 437, 441, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965); *see generally* Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause*, 72 YALE L.J. 330 (1962) (providing a history of the bill of attainder). It was often used in the sixteenth, seventeenth, and eighteenth centuries to punish those who had attempted the overthrow of the government. *Brown*, 381 U.S. at 441, 85 S.Ct. 1707. Generally, the bill of attainder named the person or persons to whom it applied. Occasionally, however, it simply described

them, but it always did so with sufficient specificity effectively to name the persons. *Bounds of Legislative Specification*, *supra*, at 331 n. 6 (quoting 1699, 10 & 11 Will. 3, c. 13 (pub).) ("An Act for continuing the imprisonment ... for the late horrid conspiracy to assassinate the person of his sacred Majesty").

The Founders rejected this practice when they banned bills of attainder in the Constitution. *See* U.S. Const., Art. I, § 9, cl. 3 ("No bill of attainder ... shall be passed."). Courts and scholars have given two related justifications for this prohibition—separation of powers and the so-called "veil of ignorance."

The Supreme Court discussed separation of powers extensively in *Brown*, 381 U.S. 437, 85 S.Ct. 1707. The Court observed that the Founders believed the legislature was "not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness, of, and levying appropriate punishment upon, specific persons." 381 U.S. at 445, 85 S.Ct. 1707. When making law, legislators must act generally and prospectively. The judiciary, conversely, "operate[s] retrospectively and specifically in discrete cases and controversies." Akhil Reed Amar, Essay, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L.REV. 203, 203 (1996). This institutional distinction bars the legislature from singling out specific people or groups for punishment. The legislature can only create the law; the judiciary determines who has violated it and what the punishment will be. *See Cummings*, 71 U.S. (4 Wall.) at 323 (In enacting a bill of attainder "the legislative body ... assumes ... judicial magistracy; it pronounces

upon the guilt of the party, without any of the forms or safeguards of trial."). Thus, the bill of attainder prohibition was meant to prevent "legislative exercise of the judicial function, or more simply-trial by legislature." *Brown*, 381 U.S. at 442, 85 S.Ct. 1707.

Closely related to the separation of powers justification is that of the "veil of ignorance"—that is, "the legislature must prescribe penalties generally and prospectively," without the ability to know exactly who will be affected by the law. Amar, *supra*, at 203. Under a veil of ignorance, legislators can never be sure if or how the law will burden them or their allies, and so must legislate with a degree of impartiality and distance. The bill of attainder removes this "veil" and permits legislators to single out a fixed class. "By using these closed classes, a legislator can ensure that a legislative burden will be imposed only on persons that she dislikes and no one else—that the classification will never inadvertently 'spill over,' as it were, on to political allies." Hills, *supra*, at 241-42.

Refracting § 3328 through the prism of these purposes, it is evident the statute does not offend separation of powers or the "veil of ignorance." On the day of its enactment, Congress had no way of knowing exactly who would fall into the affected class. Since no one would be in violation of the statute until six weeks after it passed, everyone could, in theory, comply.

III. CONCLUSION

The Defendants have persuaded me that my treatment of "specification" in the January 26, 2009 Memorandum and Order was a "manifest error of law." Surrendering my "former views to a better considered

position," *McGrath v. Kristensen*, 340 U.S. 162, 177-78, 71 S.Ct. 224, 95 L.Ed. 173 (1950) (Jackson, J., dissenting), I GRANT the Defendants' motion for reconsideration (Docket No. 52) and direct the Clerk to enter judgment for the Defendants in this matter.

Michael B. ELGIN, Aaron Lawson, Henry Tucker and Christon Colby on behalf of themselves and similarly situated men throughout the United States, Plaintiffs,

v.

UNITED STATES of America, United States Department of the Treasury, and United States Department of the Interior, Defendants.

Civil Action No. 07-12391-DPW

United States District Court,
D. Massachusetts.

Jan. 26, 2009.

MEMORANDUM AND ORDER

DOUGLAS P. WOODLOCK, District Judge.

The Military Selective Service Act (the "MSSA"), 50 App. U.S.C. §§ 451-473, requires that men register with the Selective Service System between the ages of eighteen and twenty-six. 50 App. U.S.C. § 453(a). A separate federal statute, 5 U.S.C. § 3328(a)(2), provides that men who knowingly and willfully fail to register under the MSSA are ineligible for employment by a federal executive agency. The four Plaintiffs in this suit seek to maintain employment with the federal government. They were barred from doing so because

they failed to register for the military draft with the Selective Service System. When that employment bar was imposed upon them, it was no longer possible for any of them to register.

In Count One of their Amended Complaint, the Plaintiffs allege that the employment bar imposed by § 3328 is an unconstitutional bill of attainder. Plaintiffs allege in Count Two that the MSSA, which requires men—but not women—to register with the Selective Service System, violates the equal protection obligation of the Constitution. The Defendants have moved to dismiss both Counts pursuant to Fed.R.Civ.P. 12(b)(6), and the Plaintiffs have moved for partial summary judgment as to Count One.

The registration provisions of the MSSA have already occasioned unsuccessful challenges in the Supreme Court based upon the Constitution's prohibition of bills of attainder, *Selective Service System v. Minnesota Public Interest Research Group* ("*MPIRG*"), 468 U.S. 841, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984), and the Constitution's equal protection guarantee, *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). But the statutory employment bar at issue before me is materially different from the loan disqualification challenged in *MPIRG* and I find that the Court's *MPIRG* analysis actually supports the bill of attainder claim here. By contrast, there has not been a sufficient change in the material circumstances underpinning the Court's equal protection analysis in *Rostker* to justify relitigation of the issue at this time in this case. Accordingly, while I will grant partial summary judgment to the Plaintiffs

on the bill of attainder claim of Count One, I will also grant the Defendants' motion to dismiss as to the equal protection challenge.

I. BACKGROUND

The Military Selective Service Act authorizes the President to require male citizens and residents of the United States to register for the draft. The MSSA states that "it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who ... is between the ages of eighteen and twenty-six, to present himself for and submit to registration...." 50 App. U.S.C. § 453(a). The Selective Service System, the institution responsible for the registration process, became inactive in 1975 when President Ford discontinued draft registration. In 1980, Congress, at the request of President Carter, reactivated the registration process for male citizens and residents. *Rostker*, 453 U.S. at 60-61, 101 S.Ct. 2646 (citing Pub. L. 96-282, 94 Stat. 552 (1980)). President Carter then issued a Proclamation requiring registration for male citizens and residents born on or after February 1, 1960 who attained their eighteenth birthday. Proclamation No. 4771, 45 Fed.Reg. 45,247 (July 2, 1980).

In 1985, Congress created negative employment consequences through § 3328 for failing to register with the Selective Service System. The statute provided that an individual who is required to register under the MSSA, and who "knowingly and willfully" does not do so, "shall be ineligible for appointment to a position in an Executive agency." 5 U.S.C. § 3328(a).

The Plaintiffs in this case each sought to maintain employment with an executive agency of the federal government; it is undisputed[1] that each was denied a federal executive position when the relevant agency employer discovered that the Plaintiff at issue had not registered with the Selective Service System.

Michael Elgin was hired by the Internal Revenue Service ("IRS") in 1991, when he was around twenty-five. On February 22, 2007, the Office of Personnel Management ("OPM") found that Elgin was ineligible for IRS employment because he failed to register with the Selective Service System. He was around forty-one at the time he lost his job.[2]

Aaron Lawson, thirty-two, began working at the Bureau of Land Management in 2003 when he was

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[1] Because I will act upon Plaintiffs' motion for summary judgment, I draw the factual discussion in this Memorandum regarding the Plaintiffs' employment histories from the affidavits submitted by the Plaintiffs with their Local Rule 56.1 statement of material facts in support of their motion for partial summary judgment. The Defendants have moved to strike the statement and affidavits essentially on grounds they adduce facts not within the knowledge of Plaintiffs. I will deny that motion because, as material to my disposition of the Plaintiffs' partial summary judgment motion, I find the Plaintiffs have adduced competent evidence which could be contested by the Defendants, if they choose to do so, without the need for discovery.

[2] Because the Plaintiffs have not provided their dates of birth, I must estimate their ages at the time they lost their government positions, based on their ages at the time the affidavits in support of their motion for summary judgment were executed. Elgin's affidavit hinders this task because Elgin did not date the document when he executed it.

around twenty-six. He has been notified that his employment will be terminated as a result of his failure to register with the Selective Service System.[3]

Henry Tucker worked for the Federal Deposit Insurance Corporation ("FDIC") for seventeen years. An offer to work at the National Institutes of Health ("NIH"), extended in 2007, was withdrawn when the NIH learned that Tucker had never registered with the Selective Service System.[4]

Christon Colby was employed by the IRS for more than five years. In 2006, when Colby was around thirty years old, the OPM determined he had knowingly and willfully failed to register for the draft, and was not eligible for federal agency employment.

II. STANDARD OF REVIEW

On a motion to dismiss, I "accept[ ] the complaint's well-pleaded facts as true and indulg[e] all reasonable inferences in the plaintiff's favor." *Cook v. Gates*, 528 F.3d 42, 48 (1st Cir.2008). A complaint, to survive a motion to dismiss, "must allege 'a plausible entitlement to relief.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1967, 167 L.Ed.2d 929 (2007)).

I review a motion for summary judgment viewing the facts and making reasonable inferences in the light most favorable to the nonmoving party. *Cordi-Allen v.*

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[3] A date of termination has not been provided.

[4] The affidavit does not provide Tucker's age or date of birth. The affidavit also does not state whether or not Tucker is still employed by the FDIC.

Conlon, 494 F.3d 245, 250 (1st Cir.2007). The movants must show that they are entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Their motion for partial summary judgment based on a facial challenge confronts an additional hurdle. A facial challenge, "the most difficult challenge to mount successfully," requires the movant to show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

III. ANALYSIS

A. Bill of Attainder

The Plaintiffs allege that 5 U.S.C. § 3328 is an unconstitutional bill of attainder that legislatively punishes men age twenty-six and older who failed to register for the Selective Service System. The Plaintiffs present this claim as a facial challenge to the statute.

Article I of the U.S. Constitution states: "No bill of attainder or ex post facto law shall be passed." U.S. Const., Art. I, § 9, cl. 3. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977).

The Constitution's prohibition of bills of attainder was motivated by rejection of practices of the English Parliament, which periodically punished specifically designated persons or groups without trial. *United States v. Brown*, 381 U.S. 437, 447, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965) (summarizing the basic history of bills of attainder). Although bills of attainder have

traditionally identified persons by name for punishment, they may also include designations of groups of persons according to past conduct. *MPIRG*, 468 U.S. at 847, 104 S.Ct. 3348. The Bill of Attainder Clause not only protects individuals from legislative punishment, but also serves an important function in preserving the separation of powers. The Clause acts as "a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." *Brown*, 381 U.S. at 442, 85 S.Ct. 1707.

The Supreme Court has identified three requirements for a statute to qualify as an unconstitutional bill of attainder: specification of the affected persons; punishment; and lack of a meaningful judicial role. *MPIRG*, 468 U.S. at 847, 104 S.Ct. 3348.

1. **Specification**

The specification requirement is satisfied when the statute either identifies individuals by name or as ascertainable members of a group based on past conduct. *MPIRG*, 468 U.S. at 847, 104 S.Ct. 3348. A statute targeting groups based on past conduct can be a bill of attainder when the conduct "serves as 'a point of reference for the ascertainment of particular persons ineluctably designated by the legislature' for punishment." *Id.* (quoting *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961)).

Courts have identified several "guideposts" to help determine whether the specification requirement has been met. *See SeaRiver Maritime Fin. Holdings v. Mineta*, 309 F.3d 662, 669 (9th Cir.2002). One guidepost is whether the statute targets individuals or

a class based on past conduct which operates as a designation of particular persons. *MPIRG*, 468 U.S. at 847, 104 S.Ct. 3348; *SeaRiver Maritime*, 309 F.3d at 670. It is uncontested that the individuals affected by § 3328 are determined by their past acts (or more accurately, by their past failures to act).

Another guidepost is whether the past conduct consists of "irreversible acts." *MPIRG*, 468 U.S. at 848, 104 S.Ct. 3348; *SeaRiver Maritime*, 309 F.3d at 671. Plaintiffs are part of a group targeted by § 3328 whose conduct is irreversible because men who reach the age of twenty-six are no longer able to register with the Selective Service System. Michael Elgin, Aaron Lawson, Henry Tucker and Christon Colby were all twenty-six or older when their employing agencies, or prospective employing agencies, learned of their nonregistered status, and therefore they had no opportunity to correct their status.

Whether the group is "easily ascertainable" is yet another way to judge the specification requirement. *Brown*, 381 U.S. at 448-49, 85 S.Ct. 1707; *SeaRiver Maritime*, 309 F.3d at 669. The phrase "easily ascertainable" was introduced by the Court in *United States v. Lovett*, 328 U.S. 303, 315, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). In *Cummings v. Missouri*, 71 U.S. 277, 4 Wall. 277, 18 L.Ed. 356 (1866), the Court had stated that bills of attainder, though "generally directed against individuals by name," may also "be directed against a whole class." *Id.* at 323. In *Lovett*, the Court held that unconstitutional bills of attainder apply "either to named individuals or to easily ascertainable members of a group." *Lovett*, 328 U.S. at

315, 66 S.Ct. 1073. Although bill of attainder jurisprudence has not yet provided great detail as to what makes a class "easily ascertainable," the question is plainly a matter of degree that the record permits me to address in this case.

The Plaintiffs allege that § 3328 satisfies the ascertainability requirement because the statute applies to the "easily identifiable group of men born after December 31, 1959 who did not register with the Selective Service System." An online database allegedly allows for easy identification of the individuals who fall into that group. The Government responds that due to the procedures for denying an individual federal employment under § 3328, the affected group is not as "easily" identifiable as the Plaintiffs allege. The statutory language purports to impose the bar not simply upon those men who did not register, but rather, upon those who "knowingly and willfully" did not register. 5 U.S.C. § 3328(a)(2).

Under the MSSA, a person cannot be denied a right under federal law for failing to register if "the person shows by a preponderance of the evidence that the failure ... was not a knowing and willful failure to register." 50 App. U.S.C. § 462(g)(2). The procedure for determining whether an individual is eligible for federal agency employment is outlined in federal regulations, 5 C.F.R. § 300.705 (1999). If the individual is under age twenty-six, the agency will advise him to register promptly and then to show the agency proof of his registration. If the individual is age twenty-six or older, then the employing agency provides written notice to the individual that he is ineligible for federal

agency employment. 5 C.F.R. § 300.705(d)(1). If the individual submits a written application to the OPM for a decision on whether his failure to register was knowing and willful, the OPM will provide one. *Id.* Unless the OPM finds that the individual's failure to register "was neither knowing nor willful," the individual is not eligible for federal employment. 5 C.F.R. § 300.705(e). Under the statute, 50 App. U.S.C. § 462(g)(2), and the implementing federal regulations, 5 C.F.R. § 300.706(a), the burden of proof is on the applicant. As a matter of statute, this burden is not easily rebuttable because "(e)very person shall be deemed to have notice of the requirements [*inter alia* of resignation] upon publication by the President of a proclamation or other public notice fixing a time for any registration ..." 50 App. U.S.C. § 465(a). By issuing Presidential Proclamation No. 4771, 45 Fed.Reg. 45,247 (July 2, 1980), President Carter provided the requisite notice. As will appear below, this "deeming" presumption of knowledge is apparently treated as effectively irrebuttable by the OPM.

The elaborate procedures established for determining knowledge or willfulness under § 3328 give the appearance of not immediately ascertaining the members of the burdened group. In theory, an additional factual determination beyond mere lack of registration must be made. But the overall statutory structure as administered by the OPM in response to congressional direction serves to identify quite readily the individuals specified for punishment. Although the "knowingly and willfully" requirement of § 3328 seemingly makes the targeted class somewhat more difficult to ascertain, it does not remove the targeted

class from the scope of the bill of attainder prohibition. Determining ease of ascertainment is, in any event, a matter of judgment. And given the OPM's treatment of the "knowingly and willingly" element as essentially an irrebuttable presumption, *see* Section III.A.3 *infra*, nonregistration appears to be enough to establish this trait. Of course, the ease of ascertainment is not a necessary criterion, but rather "a guidepost[ ] to aid in determining whether legislation singles out a person or class." *SeaRiver Maritime*, 309 F.3d at 669. The other guideposts—targeting past conduct and the irreversibility of that conduct, *id.* at 669-70—are plainly met by § 3328's statutory categorization of affected individuals. Moreover, I find the class of persons burdened by the statute can be ascertained with relative ease. Consequently, I find the specification requirement for a bill of attainder is met by § 3328.

2. Punishment

Deciding whether a statute imposes punishment entails three inquiries: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *MPIRG*, 468 U.S. at 852, 104 S.Ct. 3348 (quoting *Nixon*, 433 U.S. at 473, 475-76, 478, 97 S.Ct. 2777). To constitute a bill of attainder, a statute need not evidence all three of these factors. *SeaRiver Maritime*, 309 F.3d at 673; *see also Nixon*, 433 U.S. at 475, 97

S.Ct. 2777 (finding that "new burdens and deprivations"—those not within the historical meaning of punishment—also "might be legislatively fashioned that are inconsistent with the bill of attainder guarantee"). Nevertheless, here, I find that all three factors are embodied in § 3328.

a. Historical meaning of punishment

The Supreme Court has consistently held that exclusion from a type of employment falls within the category of legislative punishment. *See, e.g., MPIRG,* 468 U.S. at 852, 104 S.Ct. 3348 (noting that legislative punishment "has expanded to include legislative bars to participation by individuals or groups in specific employments or professions"); *Cummings*, 71 U.S. at 321-22 ("[A]ll men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and ... in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one...."); *Ex parte Garland*, 71 U.S. 333, 377, 4 Wall. 333, 18 L.Ed. 366 (1866) ("And exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.").

The Court has recognized that exclusion from employment by the federal government in particular is punitive. "[P]ermanent proscription from any opportunity to serve the Government is a punishment, and of a most severe type." *United States v. Lovett*, 328 U.S. 303, 316, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946). In *Lovett* the Court found that Congress had invoked this type of punishment only for "odious and dangerous crimes." *Id.* I therefore conclude that the lifetime

prohibition of nonregistered males from federal agency employment after the age of twenty-five falls within the historical meaning of legislative punishment.

b. Nonpunitive legislative purpose

The second inquiry, whether the statute reasonably can be said to further a nonpunitive legislative purpose, must also be answered adversely to the Defendants. The plain purposes behind § 3328 are to impose retribution on those individuals who failed to register and to deter individuals between eighteen and twenty-six from failing to do so. Although other purposes may also bring statutory consequences within the definition of punishment, both retribution and deterrence are at the core of what it is to be punitive. *Cf. Brown*, 381 U.S. at 458, 85 S.Ct. 1707 ("It would be archaic to limit the definition of 'punishment' to 'retribution.' Punishment serves several purposes; retributive, rehabilitative, deterrent and preventive.").[5]

To insure that characterization of purpose is not mere labeling, a useful evaluative approach to this inquiry is to ask "whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation, such as the proper qualifications for a profession." *Dehainaut v. Pena*, 32 F.3d 1066, 1071-72 (7th Cir.1994) (quoting *DeVeau v. Braisted*, 363 U.S. 144, 160, 80 S.Ct. 1146, 4 L.Ed.2d 1109 (1960)). In *Dehainaut*, the Seventh Circuit

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[5] Retribution and general deterrence are the first two general factors to be considered in federal criminal sentencing when evaluating "the need for [a criminal] sentence." 18 U.S.C. § 3553(a)(2)(A) (retribution) & (B) (general deterrence).

rejected the plaintiffs' bill of attainder characterization because the court found "an adequate nexus between the restriction imposed and the legitimate government purpose." 32 F.3d at 1072.

The Defendants here have not established a nexus between a lifetime prohibition from federal agency employment and male nonregistration with the Selective Service System. There is no apparent link, other than a purpose to punish, between job qualifications for agency positions throughout the federal government and failure to register by age twenty-six. These circumstances are unlike those in *Dehainaut*, where a presidential directive permanently excluded aviation strike participants from employment with the Federal Aviation Administration ("FAA"). *Id.* at 1069. The strike participants could still apply for jobs elsewhere in the federal government; they were prohibited only from holding jobs at the FAA or related agencies. *Id.* Based on the scope of the prohibition, the Seventh Circuit concluded that the purpose of the restriction was not to punish, but rather to guarantee that individuals with a past demonstrated tendency to interfere with "the safety and efficiency of the FAA's operations" through work stoppage, *id.* at 1072, would not be placed again in that particular work environment, mingling with other workers who had not engaged in such action.

The Seventh Circuit's treatment of aviation strike participants may usefully be contrasted with the approach of *Cummings* and *Garland*, cases involving Civil War-era laws that conditioned employment on individuals taking an oath that they had never

supported the Confederacy. *Cummings*, 71 U.S. at 317; *Ex parte Garland*, 71 U.S. at 375-76. Because individuals who had prior associations with the Confederacy were unable to give this oath without perjuring themselves, the laws effectively punished individuals for supporting the Confederacy. *See Cummings*, 71 U.S. at 325; *Garland*, 71 U.S. at 377. Unlike *Dehainaut*, however, those laws had no relationship to the qualifications for the vocations in question—respectively priest and lawyer. According to the Court, "[t]he oath could not ... have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged." *Cummings*, 71 U.S. at 319. Instead, the oath was used "in order to reach the person, not the calling." *Id.*

The Court in *MPIRG* also considered the relationship between the regulation in question and the purpose it was allegedly serving. The Court there addressed the constitutionality of Section 12(f) of the MSSA, 50 App. U.S.C. § 462(f), which denies certain federal financial aid to males who failed to register under the MSSA. The Court upheld the law because it found that the purpose of Section 12(f) was to encourage registration among those who could still do so, rather than to inflict forbidden punishment. *MPIRG*, 468 U.S. at 849-50, 855-56, 104 S.Ct. 3348.

The statute in *MPIRG* is distinguishable from § 3328 in several ways. First, "the group of young men who must register for the draft overlaps in large part with the group of students who are eligible for Title IV student's aid." *Id.* at 854, 104 S.Ct. 3348. No such

overlap exists between males age twenty-six and older who have failed to register and males in the same age group employed by federal agencies.

Second, Section 12(f) was designed to regulate "*all* nonregistrants, rather than to single out intentional nonregistrants for punishment." *Id.* at 855, 104 S.Ct. 3348 (emphasis in original). By contrast, § 3328 targets knowing and willful nonregistrants. The statute's textual emphasis on knowledge and intent—*mens rea* in the terminology of the criminal laws—enhances its quality as a punitive measure.

A final distinction is that, unlike § 3328, Section 12(f) provided a thirty-day period that allowed men who were notified of their nonregistered status to register and thereby comply with the registration requirement. *MPIRG*, 468 U.S. at 849, 104 S.Ct. 3348. This ability to correct registration status is one basis on which the Court in *MPIRG* distinguished the case from *Cummings* and *Garland*, which "dealt with absolute barriers to entry into certain professions." *Id.* at 850-51, 104 S.Ct. 3348. By contrast, under § 3328, if a male employee fails to register by age twenty-six, he will be nonregistered for the rest of his life and consequently will face an absolute lifetime employment barrier such that he can never be eligible to work for a federal agency.

During recent congressional deliberations on amendments to § 3328, the House considered a bill that provided an exemption from the employment prohibition once individuals reached thirty-one years

of age. H.R. 4108, 110th Cong. (2007).[6] As reflected in the House Report on the proposed amendment, the Selective Service supported the change: "It is the position of the Selective Service System that the existing lifelong ban on federal employment for individuals who failed to register and are unable to show that their failure was not knowing and willful serves no useful registration purpose or any public policy benefit." *Id.* In short, the agency charged with administering the draft has apparently concluded that the measure serves no nonpunitive remedial purpose in encouraging compliance with the registration process. I share the view that the plain purpose of the statute is not remedial but punitive.

c. Legislative record of primary purpose

The third factor for evaluating punitive character is legislative history regarding congressional intent to punish. In demonstrating this punitive intent, the Plaintiffs face a considerable burden: "only the clearest proof would suffice." *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). The burden

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[6] The proposed amendment, which was never passed, thus indirectly acknowledged the punitive character of the current statute. Its modification from a lifetime bar to a five-year bar, after which an individual would be eligible for federal employment, of course, mirrors the maximum statute of limitations period applicable as to the direct criminal sanction for failure to register for the draft. *See* 50 App. U.S.C. § 462(a), (d). Indeed, the current employment bar of 5 U.S.C. § 3328 is more harshly punitive than the direct criminal sanction of 50 App. U.S.C. § 462, precisely because it has no limitations period but is rather a lifetime ban.

is overcome here because that clear proof is available in the legislative history of § 3328.

Senator Thurmond, who introduced the Senate version of the bill, made clear that the intentions behind the proposed law were retributive. He stated in support of the legislation that "[t]hose who irresponsibly violate the Selective Service statutes should not be allowed the benefit of a civil service job.... It is only fair." 131 Cong. Rec. S6627-02 (May 21, 1985) (statement of Sen. Thurmond). He elaborated on this retributive purpose by observing that failure to register "is particularly appalling when one considers that the possibility exists that a nonregistrant could obtain employment ahead of a veteran." *Id.* He contended that "to permit an individual to enjoy the privileges and benefits of civil service positions is not only unfair to taxpayers, it is unpatriotic." *Id.* Other legislative commentary suggests a punitive intent, albeit one targeted more toward a deterrent than a retributive goal. Senator Nunn, for example, stated, "I think it is important that we enforce [the Registration Act] and that we have sanctions for enforcement." *Id.* The legislative history establishes that in imposing "sanctions" on those who failed to register for the draft, the congressional purpose was primarily and essentially punitive.

3. Lack of a judicial trial

It is not disputed that individuals affected by § 3328 receive no meaningful judicial evaluation before being terminated or deemed ineligible for federal agency employment. Indeed, no judicial oversight at all is available. OPM decisions are governed by the Civil

Service Reform Act (CSRA), which created the OPM and authorized it to prescribe regulations for the civil service. 5 U.S.C. § 1302(a). The CSRA created "an integrated scheme" regulating administrative and judicial review of contested employment actions. *United States v. Fausto*, 484 U.S. 439, 445, 108 S.Ct. 668, 98 L.Ed.2d 830 (1988); *Dotson v. Griesa*, 398 F.3d 156, 163 (2d Cir.2005). When the CSRA applies to an action, the plaintiff has no right to judicial review. *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 32 (1st Cir.2001). The Defendants concede that an individual has no right of judicial review of an OPM decision regarding whether he knowingly and willfully failed to register with the Selective Service System.

But the Defendants insist that because the judicially unreviewable OPM hearing is performed by the executive branch, rather than the legislative branch, the statute does not qualify as *legislative* punishment. The test for bill of attainder, however, is whether the targeted individuals receive a judicial evaluation, not whether the legislature engages directly in the implementation of the punishment or delegates it to the executive branch. OPM decisionmaking procedure regarding the MSSA is particularly rigid, in large part because of the constraints placed on it by Congress. The MSSA includes a provision that "[e]very person shall be deemed to have notice of the requirements of this title upon publication by the President of a proclamation or other public notice...." 50 App. U.S.C. § 465(a). The parties have not submitted and I have found no OPM determination in which an individual has successfully

overcome this legislative presumption of knowing and willful failure to register.

The OPM, based on the legislative instruction of 50 App. U.S.C. § 465(a), has denied the applications of individuals with compelling circumstances which, but for the "deeming" presumption, appear to have the indicia of lack of knowledge and intent. For example, in *Clarke v. Office of Personnel Mgmt.*, No. H-07-0662, 2007 WL 2363295 (S.D.Tex. Aug. 17, 2007), the district court describes an individual born in the United States, but who moved to Canada when he was four years old. *Id.* at *1. The plaintiff retained his U.S. citizenship, and visited the United States on vacations, but otherwise had no contact with government officials. *Id.* He moved to Houston from Canada in 2000 at the age of twenty-six. In 2003, when he learned that federal law required him to register with the Selective Service in order to be eligible for federal employment, he tried to register but found that he was too old to do so. After Clarke sought employment with U.S. Customs and Border Protection, the OPM determined that Clarke's failure to register was knowing and willful. Despite Clarke's circumstances, including his Canadian residence until age twenty-six, the OPM ruled woodenly that "every person is deemed to have notice of the requirements of the Selective Service Requirement." *Id.* at *2. The district court found that it had no jurisdiction to review this determination.

In another case, a veteran, who served on active duty for almost fourteen years and then went into active duty with the National Guard before transferring to the Army Reserves, was found

ineligible for federal employment as a heavy mobile equipment repairer because he had not presented himself for registration. *Wyche v. Army*, 2003 WL 21417221 (M.S.P.B. Apr. 2003). President Carter's Proclamation 4771 provided a brief six-day registration window between July 21 and July 27, 1980 for those persons born in 1960, such as the appellant, who had already turned eighteen before registration was reactivated. 45 Fed.Reg. 45,247, § 1-102. The appellant contended he had entered the U.S. Army in 1979 under a delayed entry program while he completed high school before actually entering active duty on August 28, 1980. *Wyche*, 2003 WL 21417221, at *3. The Administrative Law Judge for the Merit Systems Protection Board, in the course of a decision holding that the Board did not have jurisdiction over the decision to terminate his appointment, observed that "[a]lthough the result in this appeal does not seem equitable, I find there is a statutory prohibition that renders the applicant ineligible for appointment." *Id.* at *4. Thus, a veteran who entered active military service immediately after high school was denied federal employment because "he should already have registered within 30 days of his 18th birthday; and registration after reaching age 26 is prohibited by law." *Id.* at *7 n. 3.

Although Congress has purported to delegate evaluative tasks to the OPM, the statute specifies a group for punishment based on irreversible past inaction under a regime which bars any exception by application of what for all intents and purposes is an irrebuttable presumption. It is undisputed that this group does not receive a judicial trial under the

statute. Even without the rigid formalism by which subordinate executive branch employees execute the congressional direction, an OPM administrative hearing fails to qualify as a comparable substitute for a judicial trial. *See MPIRG*, 468 U.S. at 847 n. 3, 104 S.Ct. 3348 (rejecting as "meritless" the government's argument that Section 12(f) of the MSSA, 50 App. U.S.C. § 462(f), does not dispense with a judicial trial by providing a hearing to determine if the applicant is registered). The statute's punishment is imposed after a "trial" by legislation, specifically directing essentially ministerial executive decisionmaking without any judicial role.

4. Conclusion

Because I find that § 3328 satisfies the three elements necessary to establish an unconstitutional bill of attainder for men twenty-six years of age or older who have not registered for the draft, I deny the Defendants' Motion to Dismiss Count One. With respect to the challenge to the statute Plaintiffs have mounted in their motion for partial summary judgment on this count, I conclude that no circumstances exist that would permit Congress, in contravention of the Constitution's Bill of Attainder Clause, to prohibit nonregistered males age twenty-six and older from federal agency employment for their lifetimes without judicial decisionmaking. I will therefore allow Plaintiffs' Motion for Partial Summary Judgment as to Count I.

B. Equal Protection

The remaining issue is the equal protection claim, which the Defendants argue should be dismissed

because the MSSA does not discriminate on the basis of sex. In 1981, the Supreme Court considered and accepted the government's argument against an identical equal protection claim in *Rostker*, 453 U.S. 57, 101 S.Ct. 2646. The Plaintiffs seek the opportunity to engage in discovery to develop facts regarding the evolution of the female military role since *Rostker*. The Plaintiffs contend that an apparent evolution in that role has weakened the foundation of that opinion. I find insufficient change in the governing considerations since *Rostker* was handed down to justify permitting the equal protection aspect of this litigation to continue any further. In doing so, I join my colleague Judge Harrington in concluding such a claim must be dismissed. *Schwartz v. Brodsky*, 265 F.Supp.2d 130 (D.Mass.2003).

1. **Legal principles**

The Plaintiffs' equal protection claim purports to state allegations under both the Fifth and Fourteenth Amendments. The Fourteenth Amendment applies only to states and consequently is inapplicable. Although the Fifth Amendment does not by term have an Equal Protection Clause, the Due Process Clause of the Fifth Amendment has been interpreted to include an equal protection requirement. *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

Equal protection analysis for sex-based discrimination involves "heightened review" of the challenged governmental action.[7] *United States v.*

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[7] The Plaintiffs erroneously suggest a "strict scrutiny" standard is applicable for sex-based discrimination

Virginia, 518 U.S. 515, 516, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996). Under this heightened scrutiny, "classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

The MSSA's constitutionality under the Fifth Amendment equal protection jurisprudence was analyzed fully by the Supreme Court in *Rostker*, 453 U.S. 57, 101 S.Ct. 2646, which held that the sex-based registration system under the MSSA did not violate the equal protection guarantees of the Fifth Amendment. *Id.* at 83, 101 S.Ct. 2646. The governmental objective identified in *Rostker* was "to develop a pool of potential combat troops," *id.* at 79, 101 S.Ct. 2646, an objective deemed by the Court to be an important one. *Id.* at 70, 101 S.Ct. 2646. Restricting registration to male applicants was said to be "closely related" to that interest because Congress had determined that females could not serve as combat troops. *Id.* at 79, 101 S.Ct. 2646. The Plaintiffs contend that the factual underpinnings of the Supreme Court's position in 1981 are no longer applicable.

Before considering these claims, it is worth noting that at the core of the Court's ruling in *Rostker* was the deference owed Congress and the executive by the courts in matters of national security and military policy. *Rostker*, 453 U.S. at 64-65, 101 S.Ct. 2646. *Rostker* emphasized that when a case arises in this context, the courts grant Congress greater deference than in any other area. *Id.* That, of course, does not

mean that courts "abdicate [their] ultimate responsibility to decide the constitutional question," *id.* at 67, 101 S.Ct. 2646, but the courts should avoid replacing a reasonable evaluation by the legislative branch with a judicial evaluation of what is desirable. *Id.* at 68, 101 S.Ct. 2646.

2. Application to current circumstances

The Plaintiffs challenge the factual basis of both prongs of the *Rostker* analysis: whether the statute continues to serve an important governmental objective, and whether the male-only registration system is substantially related to that interest.

a. Governmental objective

The Plaintiffs contend in their briefing that it is no longer evident the sole purpose of the draft would be to supply combat troops. Rather, they seek to use discovery to demonstrate that future drafts will instead focus on filling positions of translators, doctors, nurses, and computer specialists.

The Amended Complaint, however, alleges no facts related to the identity of the governmental objective at stake, let alone whether that objective has changed since *Rostker.* Although the Amended Complaint states conclusorily that "the prohibition against registration by women who are well qualified to serve in the military serves no important governmental objective" (Am. Compl. ¶ 67), there are no nonconclusory allegations to suggest that governmental objective has changed to become unimportant. On this pleading, I must continue to recognize the objective at stake to be the same as

determined in *Rostker* to prepare for a draft of combat troops. *Rostker*, 453 U.S. at 77, 101 S.Ct. 2646.

b. Substantially related

The Plaintiffs' focused allegations primarily relate to the prohibition of female registration as a suitable means to achieve the governmental objective of developing a pool of potential combat troops. They allege at a high degree of generality that because the role of female military personnel has changed dramatically in recent years, their exclusion from registration with the Selective Service System is no longer substantially related to an important governmental objective. They state that the number of positions open to women has increased, as has the percentage of the armed forces personnel who are female. They observe that women attend all of the military academies; and they note their acceptance in the armed forces is reflected in common references to the "men and women" in Iraq.

But the Plaintiffs have failed to allege that women are eligible for ground combat positions in the military. To be sure, women now may serve on Navy combat ships and fly Navy and Air Force combat aircraft. This resulted from post-*Rostker* legislative changes in 1991 and 1993, which lifted the ban on assigning women to these combat related roles. National Defense Authorization Act for Fiscal Years 1992 and 1993, Pub. L. No. 102-190, § 531 (1991) (repealing the statutory ban on assigning women to aircraft engaged in combat), and National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 591 (1993) (repealing the statutory ban on assigning women to

combat Navy vessels). The Plaintiffs must nevertheless acknowledge that women remain ineligible for assignment to direct combat units on the ground. Memorandum from Secretary of Defense Les Aspin to the Secretaries of the Army, Navy, et al., "Direct Ground Combat Definition and Assignment Rule" (Jan. 13, 1994). The Defendants argue that because current military policy prohibits women from serving in direct ground combat assignments, the facts underlying the "substantially related" prong in *Rostker* have not materially changed.

The exclusion of women from combat positions was a crucial factor in the Supreme Court's assessment in *Rostker*. The circumstances today, as alleged by the Plaintiffs, have changed to some degree in that military policy currently permits women to fill some limited combat positions. Yet the Plaintiffs' allegations are still not sufficient to establish that male-only draft registration is no longer substantially related to an important governmental objective. Although women are now permitted to serve in certain positions related to combat settings, the scope of their combat participation does not yet approach that level permitted for male military personnel.

The essential concerns raised and resolved in *Rostker* remain unchanged. The Court stated that with respect to the "substantially related" analysis of the registration system, one consideration is the cost-benefit analysis that Congress must perform. When women could only serve in noncombat roles, the Court found that Congress did not consider it "worth the added burdens of including women in draft and

registration plans." *Rostker*, 453 U.S. at 81, 101 S.Ct. 2646. Today, when women can serve in a limited range of combat related positions, it remains the role of Congress and not the courts to determine whether registering women for the draft justifies the added burdens this would involve. Congress has not recalibrated the cost-benefit analysis, nor is there anything in the pleading that suggests they must.

A second congressional concern noted by *Rostker* was whether the registration of women was necessary to fill those positions that the military would in fact need women to fill. Congress concluded at the time it passed the MSSA that the military's needs for positions women could fill could be met by volunteer soldiers. *Rostker*, 453 U.S. at 81, 101 S.Ct. 2646. Because of the combat restrictions placed on women, most of the combat positions continue to be filled by men. The Plaintiffs have failed to allege facts that would establish that this calculation—the number of combat positions females can fill as a proportion of the total combat positions available, discounted by the number of female volunteers one could expect—has substantially changed as a result of women's access to combat aircraft and ships. Again, Congress has not chosen to undertake such a resolution.

Finally, a concern highlighted in *Rostker* was military flexibility. "Military flexibility requires that a commander be able to move units or ships quickly," and requires recognition that "significant rotation of personnel is necessary." *Rostker*, 453 U.S. at 82, 101 S.Ct. 2646 (quoting S.Rep. No. 96-826, at 158 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2648). Staffing

women in noncombat positions during a military mobilization does not enhance this flexibility because women could not be rotated into ground combat positions. *See Rostker,* 453 U.S. at 81-82, 101 S.Ct. 2646. If women continue to be prohibited from direct combat on the ground, flexibility remains an important concern to which male-only registration is substantially related.

CONCLUSION

For the reasons set forth more fully above, I conclude the Plaintiffs have demonstrated as a matter of law that 5 U.S.C. § 3328 is an unconstitutional bill of attainder when the statute's federal employment bar is imposed on men aged twenty-six or over; I therefore GRANT the Plaintiffs' Motion for Partial Summary Judgment (Docket No. 19), and DENY Defendants' Motion to Dismiss (Docket No. 10) as to Count One. I conclude further that the Plaintiffs have failed to state a claim that the Military Selective Service Act, 50 App. U.S.C. §§ 451-473, violates the Constitution's equal protection guarantees; I therefore GRANT the Defendants' Motion to Dismiss (Docket No. 10) with respect to Count Two of the Amended Complaint.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

MICHAEL B. ELGIN,
Appellant,

v.

DEPARTMENT OF THE TREASURY,
Agency.

DOCKET NUMBER PH-0752-08-0004-I-1
DATE: November 16, 2007

Harvey Schwartz, Esquire, Boston, Massachusetts, for the appellant.

Bonnie S. Edwards, Esquire, New York, New York, for the agency

BEFORE
Lystra A. Harris
Administrative Judge

INITIAL DECISION

On September 28, 2007, Michael B. Elgin (appellant), filed an appeal with the United States Merit Systems Protection Board (Board), challenging the decision of the Department of the Treasury (agency) to terminate him from his position as a GS-

2210-11 Information Technology (IT) Specialist with the Internal Revenue Service (IRS), Modernization and Information Technology Services, Andover Campus, Andover, Massachusetts, effective July 27, 2007. Initial Appeal File (IAF), Tab 1. For the following reasons, the appeal is DISMISSED for lack of jurisdiction and without the requested hearing.[1]

STATEMENT OF THE CASE

The appellant, who was born in 1965, began his employment with the IRS as a Data Transcriber on February 11, 1991 and certified that he had registered with the Selective Service on that date. IAF, Tab 6 (agency response file), Tabs 4a and 4p. In 2002, the appellant underwent a background investigation upon his selection for the IT Specialist position which required his completion of a Standard Form (SF) 85P (Questionnaire for Public Trust Position). *Id.* at Tabs 4k and 4l. During that background investigation, it was discovered that the appellant had not registered with the Selective Service.[2] *Id.* at Tabs 4j - 4k.

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[1] Although the appellant requested a hearing, he is not entitled to one because he has not made a non-frivolous allegation of Board jurisdiction. *See Garcia v. Department of Homeland Security*, 437 F.3D 1322, 1344 (Fed. Cir. 2006). A non-frivolous allegation of jurisdiction is an allegation of fact that, if proven, would establish a prima facie case that the Board has jurisdiction over the matter at issue. *See Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994).

[2] The appellant was then over 26 years and therefore past the maximum age for registration with the Selective Service. *See* 50 U.S.C.App. 453 (Military Selective Service Act).

By letter dated November 12, 2003, the agency (1) notified the appellant that his failure to register with the Selective Service would render him ineligible for appointment to a position in an executive agency of the Federal government unless he demonstrates that his failure to register was neither knowing or willful and (2) invited the appellant to submit an explanation with supporting or relevant documentation. *Id.* at Tab 4j. By letter dated December 9, 2003, the agency submitted a request to the United States Office of Personnel Management (OPM) for a determination as to whether the appellant's response met the standard for waiver of the registration requirement. *Id.* The agency forwarded to OPM the information which the appellant submitted to explain his failure to register for the Selective Service with its December 3, 2003 letter, as well as with its letter dated April 28, 2004, which again asked OPM to make a determination regarding the appellant. *Id.* at Tabs 4e, 4i - 4j.

A letter from OPM dated February 6, 2006 states that the appellant's explanation of his failure to register with the Selective Service was insufficient to demonstrate that such failure was neither knowing nor willful. *Id.* at Tab 4f. The agency sought reconsideration of OPM's determination, commending the appellant's employment record and re-asserting the appellant's position that his failure to register was an "inadvertent mistake," and not a knowing and willful act. *Id.* at Tab 4d. Upon such reconsideration, OPM, through its director, issued notice, dated February 22, 2007, of its final determination that the appellant had presented insufficient evidence "to

overcome the statutory presumption that [his] failure to register was knowing and willful." *Id.* at Tab 4c.

Citing OPM's final determination, the agency issued notice to the appellant by letter dated July 18, 2007, that his services to the IRS would be terminated, effective July 27, 2007. *Id.* at Tab 4b. This appeal followed.

Because the appeal appeared to be untimely filed, I issued an Acknowledgment Order outlining the appellant's burden of proof regarding timeliness and directing the appellant to file evidence or argument on the timeliness issue. IAF, Tab 2. The appellant filed a timely response to the Acknowledgment Order, arguing that he was not advised of appeal rights to the Board in the agency's termination notice, the OPM notice of its final determination, or the written denial of his union grievance. IAF, Tab 4.

I held a telephonic conference with the parties on October 11, 2007 during which the agency (1) raised the question of whether the Board has jurisdiction to review the appellant's termination at issue and (2) requested additional time to file its response to the appeal which would include a request to dismiss for lack of jurisdiction or timeliness, without opposition from the appellant. IAF, Tab 5 (Order And Summary Of Conference Call).

I granted the agency's request for additional time to respond and ordered a deadline for the appellant's reply to the agency's submission. *Id.*; *see also* IAF, Tab 7 The agency timely filed its response file which included a request to dismiss the instant appeal for lack of jurisdiction. IAF, Tab 6. In its request to

dismiss for lack of jurisdiction, the agency argues that the Board cannot review OPM's final determination in this matter. *Id.* The appellant filed a timely reply in opposition to the agency's dismissal request, arguing that the Board has jurisdiction to review the agency's action terminating the appellant's appointment based on the appellant's claims of constitutional violation, gender discrimination, prohibited personnel practice under 5 U.S.C. § 2302 (b)(12), as well as the his request for review of OPM regulations. IAF, Tab 8.

FINDINGS AND ANALYSIS

The Board does not have jurisdiction over every action that is alleged to be incorrect; rather its appellate jurisdiction is limited to that conferred on it by statute, rule, or regulation. *Maddox v. Merit Systems Protection Board*, 759 F. 2d 9, 10 (Fed. Cir. 1985); *Strope v. United States Postal Service*, 71 M.S.P.R. 429, 434-35 (1996). An appellant against whom an agency takes an action based on an allegedly unlawful appointment is not deprived of the procedural rights to which he would be otherwise entitled unless the appointment violates an absolute statutory prohibition which disqualifies the appointee for appointment in the civil service. *Keller v. Department of the Navy*, 69 M.S.P.R. 183, 187 (1996); *Garcia v. Department of the Air Force*, 18 M.S.P.R.142, 145 (1983); *Travaglini v. Department of Education*, 18 M.S.P.R.127, 137-38 (1983).

I note that an appellant must be afforded explicit information concerning what is required to establish jurisdiction over his appeal. *See Burgess v. MSPB*, 758 F.2d 641, 643-44 (Fed.Cir.1985). That obligation may

be satisfied where the agency's motion to dismiss informs the appellant of what he has to allege to establish jurisdiction. *See Gonzalez v. U.S. Postal Service*, 77 M.S.P.R. 382, 386 (1998). I find the agency's dismissal motion included with its response to this appeal afforded the appellant the requisite information concerning the jurisdiction.

The requirement for Selective Service registration is found at 5 U.S.C. § 3328 and its implementing regulations promulgated by OPM are found at 5 C.F.R. §§ 300.701 - 707.

The pertinent statute provides the following:

> An individual who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C. App. 453); and who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable ... shall be ineligible for appointment to a position in an executive agency.

See 5 U.S.C. § 3328(a)(1) - (2).

The pertinent statute also provides the following:

> [OPM], in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. Such regulations shall include provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful. Such procedures shall require that such a determination may not be

> made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful. Such procedures may provide that determinations of eligibility under the requirements of this section shall be adjudicated by the Executive agency making the appointment for which the eligibility is determined.[3]

See 5 U.S.C. § 3328(b).

OPM has the authority to make the final determination as to whether the failure to register with the Selective Service was knowing and willful with the burden of proof on the individual to show by preponderant evidence that such failure was not knowing and willful. See 5 C.F.R. § 300.706.

An absolute statutory prohibition against appointment precludes Board review

Here, the agency argues that 5 U.S.C. § 3328 constitutes an absolute statutory bar to the appellant's appointment to an Executive agency when OPM has made a final determination that the appellant's failure to register with the Selective Service was knowing and willful. I find the agency's argument has merit. Because the statutory prohibition against the appellant's appointment is absolute, I find the appellant has no entitlement to Board review of the

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[3] OPM's regulations, entitled "Statutory Bar to Appointment of Persons Who Fail to Register Under Selective Service Law," provide that an individual who is required to be registered but who is not registered, will be terminated by his agency. 5 C.F.R. § 300.707.

agency's action at issue in this matter. *Lovoy v. HHS*, 94 M.S.P.R. 571, 586 (2003), citing *Travaglini v. Department of Education*, 23 M.S.P.R. 417, 419 (1984).

I am sympathetic to the appellant and I am aware that this finding seems harsh, given the appellant's years of service with the agency. However, he has failed to identify a law, regulation or rule which entitles him to Board review of the agency's action notwithstanding the statutory prohibition against his appointment.

The appellant does not contend that 5 U.S.C. § 3328 allows for his appointment to the agency; he proffers no evidence or argument contrary to the proposition that 5 U.S.C. § 3328 constitutes an absolute bar to his appointment. IAF, Tab 8. Instead, the appellant argues that the Board has jurisdiction over this matter based on his claims that (1) the statutory bar to his appointment violates the prohibition against bills of attainder in the United States Constitution, (2) he was subject to gender-based discrimination by the agency, and (3) he was subject to a prohibited personnel practice under 5 U.S.C. § 2302(b)(12). Id.

Claims of constitutional violation and discrimination do not confer jurisdiction

I find the Board lacks authority to determine the constitutionality of a statute.[4] 5 C.F.R. § 1201.3; *see*

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[4] Without addressing the constitutionality of the statutes implicated in this appeal, I note the United States Supreme Court has held that Congress acted within its authority under the Constitution to require registration of men, and not women, with the Selective Service. *See Rostker v. Goldberg*, 453 U.S. 57

also Brooks v. Office of Personnel Management, 59 M.S.P.R. 207, 215 n. 7 (1993). To the extent the Board could review the constitutionality of the agency's application of a statute, I find such review is precluded in the instant matter because the appellant's constitutional claim is not coupled with an independently appealable action. *See Smith v. DOD*, 106 M.S.P.R. 228, P 13 (2007), *citing Manning v. MSPB*, 742 F.2d 1424, 1428-29 (Fed.Cir.1984) (appellant first must demonstrate that the Board has been authorized by law, rule, or regulation to review the agency's action for the Board to have jurisdiction over claimed constitutional violations).

The merit system principles set forth at 5 U.S.C. § 2302 are not self-executing and are not an independent source of Board jurisdiction. *See, e.g., D'Leo v. Department of the Navy*, 53 M.S.P.R. 44, 48 (1992). Therefore, the appellant's allegations of gender discrimination or any other prohibited personnel practice under 5 U.S.C. § 2302, standing alone, do not confer jurisdiction to the Board. *Saunders v. Merit Systems Protection Board*, 757 F. 2d 1288, 1290 (Fed. Cir. 1985), citing, *Wren v. Dep't of the Army*, 2 M.S.P.R. 1, 2 M.S.P.B. 174 (1980), *aff'd.*, 220 U.S. App. D.C. 352, 681 F.2d 867 (D.C. Cir. 1982).

(1981)(the purpose of registration with the Selective Service is to create a combatant pool for which women are exempt because of their ineligibility for combat).

The Board's regional office cannot review the validity of OPM regulations

In his reply to agency's dismissal request on jurisdictional grounds, the appellant appears to petition the Board to review the agency's action under 5 U.S.C. § 1204(f)(2). IAF, Tab 8. The appellant maintains that OPM's regulations implementing 5 U.S.C. § 3328 require the agency to commit a personnel practice prohibited by 5 U.S.C. § 2302(b)(12), i.e., the violation of a "law, rule, or regulation implementing, or directly concerning the merit system principles contained in" 5 U.S.C. § 2301. *Id.* In support of his position, the appellant asserts that OPM's regulations require the agency to violate Article 1, Section 9 of the United States Constitution which prohibits bills of attainder.[5] *Id.*

Under 5 U.S.C. § 1204(f)(1), the Board has authority to review rules and regulations promulgated by OPM. *See Henderson v. Office of Personnel Management*, 102 M.S.P.R. 488, 490 (2006). The Board may declare regulatory provisions invalid if the provisions will require any employee to commit a

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[5] It should be noted that the constitutional prohibition against bills of attainder applies to the imposition of punishment and the United States Supreme Court has held that a law which makes the issuance of government-conferred benefits contingent on an individual's satisfying a feasible requirement or overcoming a reversible condition in the future is not a bill of attainder. *See Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984) (statute denying federal student aid to males who fail to register for draft does not inflict punishment within meaning of Bill of Attainder Clause).

prohibited personnel practice. See 5 U.S.C. § 1204(f)(2)(A) - (B); *Henderson*, 102 M.S.P.R. at 490. However, a request for regulation review falls under the Board's original jurisdiction. *See Avery v. OPM*, 94 M.S.P.R. 212, 214-15 (2003). Consequently, the procedures for appealing agency actions to the Board's regional offices do not apply. *See* 5 C.F.R. § 1203.1(b)(2). A request for OPM regulation review must be filed with the Office of the Clerk of the Board in Washington, D.C, pursuant to the provisions of 5 C.F.R. §§ 1203.11 - 1203.14. Therefore, I conclude the appellant's request for regulation review is not a basis for establishing the Board's jurisdiction to adjudicate the appellant's termination at issue.

Timeliness issue need not be addressed

Because I find that the Board lacks jurisdiction, the issue of timeliness need not be addressed. *See Deloach v. Department of the Treasury*, 58 M.S.P.R. 574, 577 n.1 (1993), appeal after remand, 61 M.S.P.R. 520 (1994); see also *Popham v. United States Postal Service*, 50 M.S.P.R. 193, 197-98 (1991).

DECISION

The appeal is DISMISSED.

FOR THE BOARD:

Lystra A. Harris
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on **December 21, 2007,** unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if you prove that you received this initial decision more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. You must establish the date on which you received it. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.,
Washington, DC 20419

A petition for review may be filed by mail, facsimile (fax), personal or commercial delivery, or electronic filing. A petition for review submitted by electronic

filing must comply with the requirements of 5 C.F.R. § 1201.14, and may only be accomplished at the Board's e-Appeal website (https://e-appeal.mspb.gov).

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be filed with the Clerk of the Board no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you claim that you received this decision more than 5 days after its issuance, you have the burden to prove to the Board the date of receipt. You may meet your burden by filing evidence and argument, sworn or under penalty of perjury (*see* 5 C.F.R. Part 1201, Appendix 4) to support your claim. The date of filing by mail is determined by the postmark date. The date of filing by electronic filing is the date of submission. The date of filing by personal delivery is the date on which the Board receives the document. The date of filing by commercial delivery is the date the document was delivered to the commercial delivery service. Your petition may be rejected and returned to you if you fail to provide a statement of how you served your petition on the other party. *See* 5 C.F.R. § 1201.4(j).

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, http://fedcir.gov/content.html. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CIVIL SERVICE REFORM ACT

Relevant excerpts of the Civil Service Reform Act, 92 Stat. 1111 *et seq.* are reproduced below.

5 U.S.C. § 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5 U.S.C. § 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)

(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal

from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

[(b)(2)-(3)]

(c)

(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302 (b) of this title; or

(C) shows that the decision was not in accordance with law.

[(d)-(j)]

(k) The Board may prescribe regulations to carry out the purpose of this section.

5 U.S.C. § 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)

(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16 (c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a (c)), and

section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216 (b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the

Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

OPPOSITION BRIEF

No. 11-45

In the Supreme Court of the United States

MICHAEL B. ELGIN, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, precludes petitioners from seeking equitable relief in district court based on allegations that they were unconstitutionally terminated from federal employment.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 641 F.3d 6. The opinion of the district court granting petitioners' motion for partial summary judgment and denying in part and granting in part respondents' motion to dismiss (Pet. App. 65a-93a) is reported at 594 F. Supp. 2d 133. The opinion of the district court granting respondents' motion for reconsideration and granting respondents' motion to dismiss (Pet. App. 39a-64a) is reported at 697 F. Supp. 2d 187.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. The petition for a writ of certiorari was filed on July 7, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978) (*Senate Report*)). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judgment." *Id.* at 444-445 (citations omitted); accord *Senate Report* 63.

"Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), which "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal

employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445. The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * *, including the availability of administrative and judicial review," *id.* at 443.

b. Under the CSRA, a federal employee who believes that an unlawful adverse action, including removal, has been taken against him may appeal the agency's decision to the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see 5 U.S.C. 7512, 7513(d); see also 5 U.S.C. 1201, 1204; 5 C.F.R. 1201.3. If the MSPB decides in favor of the employee and reverses the employing agency's removal action, it is empowered to order appropriate relief, including reinstatement and back pay. See 5 U.S.C. 1204(a)(2); *Smith* v. *Department of the Army*, 458 F.3d 1359, 1364-1365 (Fed. Cir. 2006).

An employee may seek judicial review of a final determination by the MSPB. 5 U.S.C. 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such judicial review is the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b). The Federal Circuit is required to review the record and to "hold unlawful and set aside any agency action, findings, or conclusions found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; procedurally improper; or "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. Petitioners are four former federal employees who were discharged (or allegedly constructively discharged) by their employing agencies for knowingly and

willfully failing to register with the Selective Service. Pet. App. 3a. The Military Selective Service Act requires all male U.S. citizens and permanent-resident aliens between the ages of 18 and 26 to register for the military draft in the manner prescribed by the President. 50 U.S.C. App. 453(a). Although President Ford briefly suspended the selective-service-registration requirements in 1975, President Carter reinstituted them in 1980 for men born on or after January 1, 1960, and they remain in force today. 50 U.S.C. App. 453 note.

In 1985, Congress passed a law, codified at 5 U.S.C. 3328, disqualifying from federal employment anyone who has "knowingly and willfully" failed to comply with the current selective-service requirements. 5 U.S.C. 3328(a); see Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Congress further directed the Office of Personnel Management (OPM) to promulgate implementing regulations, including regulations governing the determination of whether a failure to register was knowing and willful. 5 U.S.C. 3328(b). OPM's regulations require agencies to discharge employees over the age of 26 who failed to register for the Selective Service when required to do so, unless OPM determines in response to the employee's explanation that the failure was neither knowing nor willful. 5 C.F.R. 300.705(d), .707; see also 5 C.F.R. 300.706 (procedures for OPM determination).

Following their termination (or alleged constructive termination) under those provisions, none of the petitioners pursued his CSRA remedies to completion. Pet. App. 3a. Only one of petitioners, Michael B. Elgin, appealed his termination to the MSPB. Pet. 8-9. His appeal was referred to an administrative judge for an initial decision. Pet. App. 94a; see 5 U.S.C. 7701(b)(1) (per-

mitting referral of MSPB appeals to administrative judge); see also 5 C.F.R. 1201.111. The administrative judge dismissed the case "for lack of jurisdiction." Pet. App. 95a. Elgin raised constitutional challenges to Section 3328, but the administrative judge concluded that the MSPB "lacks authority to determine the constitutionality of a statute." *Id.* at 101a. The decision advised Elgin of his rights to petition for review by the full MSPB and to appeal a final MSPB decision to the Federal Circuit. *Id.* at 105a-107a; see also 5 C.F.R. 1201.113 and .114 (describing procedures for petitioning for full MSPB review). Elgin pursued neither option. Pet. App. 4a.

3. Petitioners subsequently filed this putative class-action suit in the District of Massachusetts. Pet. App. 4a, 65a. They do not presently contest that they knowingly and willfully failed to register for the selective service. *Id.* at 3a. Nor do they presently contest that 5 U.S.C. 3328 and OPM regulations required their discharge. They instead contend that Section 3328 is unconstitutional, alleging that it is both a bill of attainder and discriminates on the basis of gender in violation of the equal protection component of the Fifth Amendment. See U.S. Const. Art. I, § 9, cl. 3 ("No Bill of Attainder * * * shall be passed."); U.S. Const Amend. V. They seek a declaratory judgment that 5 U.S.C. 3328 is unconstitutional, injunctive relief barring enforcement of Section 3328, and reinstatement with full back pay and benefits. C.A. App. 36-37.

The district court initially dismissed the equal-protection claim but granted partial summary judgment for petitioners on the bill-of-attainder claim. Pet. App. 65a-93a. The court reasoned that the equal-protection issue was controlled by this Court's decision in *Rostker*

v. *Goldberg*, 453 U.S. 57 (1981), which rejected an equal-protection challenge to the Military Selective Service Act. Pet. App. 86a-93a. The court initially took the view, however, that Section 3328 is an unlawful bill of attainder, *i.e.*, "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Id.* at 70a (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)); see *id.* at 70a-86a.

The district court subsequently granted the government's motion for reconsideration and dismissed the case. Pet. App. 39a-64a. In its motion, the government had argued that petitioners' suit was barred because the CSRA provided the exclusive mechanism for challenging petitioners' terminations. *Id.* at 41a-42a. The district court rejected that argument, reasoning that no CSRA provision expressly granted the MSPB jurisdiction to consider petitioners' constitutional claims; that certain administrative decisions (including in Elgin's case) had concluded that the MSPB lacked authority to consider such claims; that the Federal Circuit would similarly lack authority to consider such claims; and that the claims were therefore properly brought under the general district-court jurisdictional statute, 28 U.S.C. 1331. Pet. App. 43a-51a. But, reconsidering its earlier constitutional analysis, the district court agreed with the government that Section 3328 is not a bill of attainder because the statute does not target an individual or class that was readily ascertainable at the time it was enacted. *Id.* at 54a-63a.

4. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss petitioners' complaint on jurisdictional grounds "without prejudice to the pursuit of remedies under the CSRA to

the extent that they may be available at this late date." Pet. App. 15a; see *id.* at 1a-38a. Stating that "there is something of a circuit split" on the issue, the court held that the CSRA bars district-court adjudication of petitioners' challenge to their dismissals. *Id.* at 11a-12a & n.4; see *id.* at 5a-15a. Petitioners did not dispute, the court noted, that the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." *Id.* at 6a. The court concluded, contrary to petitioners' contentions, that the CSRA provides "a route to direct review of their constitutional claims by an Article III court." *Ibid.* The court reasoned that even if the MSPB itself lacks authority to strike down a statute on constitutional grounds, the Federal Circuit could do so on review of the MSPB decision and then order the MSPB to grant relief. *Id.* at 13a. The court of appeals noted that the Federal Circuit had in fact recognized that "if a colorable constitutional claim were presented, it would have to address the issue." *Id.* at 14a (citing cases). Although the court noted that "[t]he substantive constitutional claims in this case are unpromising," it concluded that those claims were properly channeled to the Federal Circuit under the CSRA. *Ibid.*

Judge Stahl concurred in the judgment. Pet. App. 15a-38a. In his view, petitioners' complaint was properly before the court because CSRA does not clearly foreclose district-court jurisdiction over constitutional claims like petitioners'. *Id.* at 15a-26a. He would, however, have affirmed the district court's dismissal of petitioners' complaint on the merits. *Id.* at 27a-38a.

ARGUMENT

The court of appeals correctly concluded that the CSRA provided an avenue for petitioners to contest

their terminations and precludes a district-court suit challenging the agencies' actions on constitutional grounds. The decision is consistent with this Court's precedents recognizing the comprehensiveness and exclusivity of the CSRA, and further review in this case is not warranted to resolve any differences in approaches taken by the courts of appeals. Certiorari should accordingly be denied.

1. This Court has consistently held that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies that the statute explicitly provides. In *United States* v. *Fausto*, 484 U.S. 439 (1988), for example, the Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," *id.* at 445, the absence of provision in the CSRA for excepted-service employees to obtain judicial review of a suspension meant such employees were precluded from seeking review under the Back Pay Act of 1966, 5 U.S.C. 5596. *Fausto*, 484 U.S. at 448. The Court concluded that the comprehensive nature of the CSRA made it "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Id.* at 448-449.

In *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court declined to infer a private right of action for federal employees to enforce their statutory right under the CSRA to fair representation. Noting that the CSRA "expressly provide[s]" employees with "an administrative remedy" before the Federal Labor Relations Authority (FLRA)

for a union's breach of its duty and allows for judicial review of the FLRA's decision, this Court declined to infer a judicial right of action in district court against the union. *Id.* at 533. The Court explained that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA and to confine the courts to the role given them under the Act." *Id.* at 536-537.

Similarly, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages based on alleged First Amendment violations occurring during the plaintiff's federal employment. The Court concluded that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, we conclude that it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Bush*, 462 U.S. at 368.[1]

2. The court of appeals noted that petitioners "do not contest the view that the statutory route, where it applies, is the exclusive remedy for an employee chal-

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[1] Although the agency actions at issue in *Bush* took place before the CSRA was enacted, see 462 U.S. at 369-370, the decision discussed the CSRA, see, *e.g.*, *id.* at 385 n.25, and its reasoning applies equally to the CSRA. See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc; per curiam); see also *Karahalios*, 489 U.S. at 536.

lenging removal." Pet. App. 6a. They contend (Pet. 21-32) that the CSRA does not in fact provide an avenue for judicial review of their constitutional claims, and that a freestanding cause of action in district court is therefore necessary to vindicate their constitutional rights. Citing *Webster* v. *Doe*, 486 U.S. 592 (1988), petitioners assert that the CSRA may not be construed to preclude judicial review of constitutional claims such as theirs in the absence of a clear statement of congressional intent.[2]

Contrary to petitioners' argument, the CSRA does not preclude judicial review of their constitutional claims, but instead merely channels such review to a particular judicial forum: the Federal Circuit. Like other covered federal employees who believe they have been unlawfully terminated, petitioners could (and one petitioner did) challenge their terminations before the MSPB. See pp. 3-5, *supra*. Insofar as petitioners challenge the constitutionality of federal statutes disqualifying them from federal employment, "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994) (brackets in original; citation omitted), and the MSPB has accordingly concluded that it is "without authority to determine the con-

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[2] Petitioners correctly observe (Pet. 23) that the government's brief in *Whitman* v. *Department of Transportation*, 547 U.S. 512 (2006) (per curiam), acknowledged that "[t]he language of the CSRA does not meet the 'heightened showing,' *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims." U.S. Br. at 47, *Whitman*, *supra* (No. 04-1131). But *Webster*'s "heightened showing" requirement is irrelevant here because, as explained in the text, the CSRA provides an avenue for judicial review of constitutional claims like petitioners' in the Federal Circuit, and thus does not "foreclose" judicial review of such claims.

stitutionality of Federal statutes" on their face (although it will adjudicate as-applied challenges). *Bayly* v. *OPM*, 42 M.S.P.R. 524, 525-526 (1990). But in the absence of adequate relief from the MSPB, petitioners could have sought judicial review from the Federal Circuit. 5 U.S.C. 7703(a)(1) and (b)(1); see Pet. App. 3a-4a. That court, in the exercise of its judicial-review authority under the CSRA, would have been able to adjudicate their constitutional challenges to 5 U.S.C. 3328.

As this Court has recognized in analogous contexts, even if a federal agency cannot itself adjudicate a constitutional claim, the claim may nevertheless be "meaningfully addressed by the Court of Appeals" in reviewing the agency's decision. *Thunder Basin Coal Co.*, 510 U.S. at 215 (discussing statutory-review scheme in the Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. 801 *et seq.*); see *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000) (concluding that court reviewing agency's Medicare-related determination could "resolve any statutory or constitutional contention that the agency does not, or cannot, decide"); see also Pet. App. 13a. The CSRA expressly authorizes the Federal Circuit to "hold unlawful and set aside" any agency action found to be "not in accordance with law." 5 U.S.C. 7703(c)(1). The Federal Circuit accordingly would have authority to consider (and potentially grant relief on) petitioners' constitutional claims, even if the MSPB were unable to do so in the first instance.

Petitioners nevertheless hypothesize (Pet. 30-31) that, had they availed themselves of the CSRA's judicial-review provisions, the Federal Circuit would have refused to consider any constitutional arguments that the MSPB believed were beyond an administrative

agency's power to decide. Petitioners cite no Federal Circuit case that so holds, however, and we are aware of none. See Pet. App. 14a ("The Federal Circuit has never said that it was powerless to act where a removal occurred and the underlying statute that prompted the removal was itself unconstitutional."). Petitioners' prediction is based on cases in which the Federal Circuit has stated that "the scope of its jurisdiction on appeal is coextensive with the MSPB's." Pet. 30. But the cases cited by petitioners merely stand for the proposition that the types of personnel actions that the Federal Circuit can review on petition from an MSPB decision are limited to the types of personnel actions that the MSPB itself is authorized to adjudicate. See Pet. 31 (citing *Perez* v. *Merit Sys. Prot. Bd.*, 931 F.2d 853 (Fed. Cir. 1991) (MSPB, and therefore Federal Circuit, lacked authority to adjudicate certain type of personnel action); *Manning* v. *Merit Sys. Prot. Bd.*, 742 F.2d 1424 (Fed. Cir. 1984) (same); *Rosano* v. *Department of the Navy*, 699 F.2d 1315 (Fed. Cir. 1983) (same)). The cited cases do not stand for the proposition that the Federal Circuit (an Article III court) lacks authority to consider legal arguments concerning personnel actions subject to MSPB review simply because an administrative agency could not consider them. As discussed above, that proposition is incorrect, and there is no reason to assume that the Federal Circuit would adopt it.[3]

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[3] Petitioners point to instances in which MSPB appeals presenting constitutional challenges to 5 U.S.C. 3328 have been referred to individual administrative judges who have then dismissed the appeals for "lack of jurisdiction." Pet. 28 & n.5 (citing additional cases); see also Pet. App. 95a. The individual-judge decisions cited by petitioners are not precedential, 5 C.F.R. 1201.113, and would not be binding on the full MSPB or the Federal Circuit.

Indeed, the government has previously acknowledged, and the Federal Circuit has accepted, that the Federal Circuit has the power to determine the constitutionality of a federal statute underlying an employee's removal from government service, even when the MSPB itself concluded that it lacked authority to address the issue. *Briggs* v. *Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1310-1312 (Fed. Cir. 2003) (considering challenges to the Hatch Political Activity Act, 5 U.S.C. 1501-1508, 7321-7326). Petitioners' prediction that the Federal Circuit might reach a contrary conclusion in a different case does not warrant this Court's review.

3. a. Petitioners contend (Pet. 14-23) that this Court should grant review to resolve a conflict among the courts of appeals about the availability of equitable relief to federal employees outside the framework of the CSRA. The court of appeals' decision in this case is consistent with the conclusions of the majority of circuits to have addressed the question presented. As petitioners acknowledge (Pet. 19-20), the Second and Tenth Circuits have held that the comprehensive nature of the CSRA precludes district courts from adjudicating claims for equitable relief from constitutional violations alleged to arise out of a federal personnel action. See *Dotson* v. *Griesa*, 398 F.3d 156, 180 (2d Cir. 2005), cert. denied, 547 U.S. 1191 (2006); *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961-962 (10th Cir. 1989).

The Ninth Circuit has likewise concluded that the CSRA provides the exclusive means for an employee covered by the statute to seek review of a personnel action alleged to violate the Constitution. *Saul* v. *United States*, 928 F.2d 829 (1991). Petitioners err insofar as they suggest (Pet. 17-19 & n.3) that the Ninth Circuit retreated from *Saul* in *American Federation of Govern-*

ment Employees Local 1 v. *Stone*, 502 F.3d 1027 (2007). *Stone* addressed whether district-court actions seeking injunctive relief from assertedly unconstitutional personnel actions are precluded where the CSRA affords no alternative remedy—a circumstance not present in *Saul*. See *id.* at 1037. The decision below, which concluded that the CSRA does provide a remedy to petitioners, does not conflict with the holding of *Stone*.

Two circuits have concluded that, at least in some circumstances, the CSRA does not prevent a covered federal employee from seeking equitable relief for a constitutional employment claim. The Third Circuit, in *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995), permitted federal-employee plaintiffs to bring First Amendment retaliation claims in district court, although it recognized that "a good argument can be made that a federal employee who has meaningful administrative remedies and a right to judicial review under the CSRA or another comparable statutory scheme should not be permitted to bypass that scheme by bringing an action under 28 U.S.C. § 1331 and seeking injunctive or declaratory relief." *Id.* at 34. The District of Columbia Circuit has suggested that equitable relief is at least sometimes available for federal employees asserting constitutional claims, but it generally requires exhaustion of administrative remedies as a prerequisite to bringing suit. See *Steadman* v. *Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (1990) ("Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court.").

b. Contrary to petitioners' contention (Pet. 21-23), any disagreement among the circuits does not warrant further review in this case. The court of appeals noted

that petitioners did not "contest the view that the statutory route, where it applies, is the exclusive remedy for an employee challenging removal," but instead argued that "the statutory remedy is not available to them." Pet. App. 6a. The court of appeals' conclusion that the CSRA does afford a remedy to petitioners does not conflict with the holdings of other circuits and, for the reasons explained above, see pp. 9-13, *supra*, does not warrant this Court's review. Moreover, the narrow issue whether a employee covered by the CSRA should be able to opt out of the CSRA's judicial-review provisions and instead bring suit in district court has been infrequently litigated and is thus of limited practical importance. The government is aware, for example, of only one instance, in the 16 years since *Mitchum* was decided, in which a federal employee has sought equitable relief in district court in the Third Circuit based on an allegedly unconstitutional employment-related action. See *Rhodes* v. *Holt*, No. 4:CV 06-1686, 2007 WL 1704653 (M.D. Pa. June 12, 2007).

This case would not be an appropriate vehicle to resolve the alleged conflict in any event. Resolution of the question presented would not be outcome-determinative in this case because petitioners' constitutional claims are insubstantial. Both the district court (Pet. App. 54a-64a, 86a-93a) and the dissenting judge on the court of appeals (Pet. App. 27a-38a) rejected petitioners' arguments on the merits. And the court of appeals majority labeled petitioners' claims as "unpromising, given that one [the equal-protection argument] conflicts with governing Supreme Court precedent [*Rostker* v. *Goldberg*, 453 U.S. 57 (1981)], and the other [the bill-of-attainder argument] ignores the fact that [petitioners] were free to avoid the bar by timely registration" with the Selec-

tive Service. Pet. App. 14a. No further review of those claims, or petitioners' ability to bring them notwithstanding their failure to exhaust their remedies under the CSRA, is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2011

REPLY BRIEF

Supreme Court, U.S.
FILED
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No. 11-45

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,
Petitioners,

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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September 2011

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PETITIONERS' REPLY

The government argues that the petition should be denied because the First Circuit's holding that federal district courts do not have jurisdiction over federal employees' equitable constitutional claims is correct and is compelled by this Court's precedent. The government further contends that the circuit split over this issue is shallow and unimportant and that Petitioners' claims are insubstantial. None of these assertions is accurate or undermines the need for review of the question presented in the petition.

I. There Is a Genuine Circuit Split, the First Circuit's Holding Was Incorrect, and Similar Cases Are Frequently Litigated.

A. The circuit courts are divided over whether the Civil Service Reform Act (CSRA) precludes the district courts' jurisdiction over federal employees' equitable constitutional claims. The D.C. and Third Circuits have held that the CSRA does not preclude district court jurisdiction over federal employees' constitutional claims for equitable relief regardless of whether the CSRA provides a remedy for the employees' constitutional claims. *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995). On the other hand, the First Circuit here, and the Second and Tenth Circuits in *Dotson v. Griesa*, 398 F.3d 156, 179 (2d Cir. 2005), and *Lombardi v. Small Business Administration*, 889 F.2d 959, 962 (10th Cir. 1989), have held that the CSRA impliedly precludes district court jurisdiction over those same types of claims.

Seeking to minimize the circuit split, the government argues the D.C. Circuit "generally requires

exhaustion of administrative remedies as a prerequisite to bringing suit" for constitutional claims in equity for which relief is only "sometimes available." Opp. 14 (citing *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1992)). This characterization of the D.C. Circuit's stance is incorrect. *Steadman* involved former government employees whose union had failed to timely invoke the arbitration process under their collective bargaining agreement and instead brought a due process claim challenging their termination in the district court. *Steadman*, 918 F.2d at 965. The D.C. Circuit held that "when a constitutional claim is intertwined with a statutory one, and congress has provided machinery for the resolution of the latter, a plaintiff must first pursue the administrative machinery," but when "the constitutional claim raises issues totally unrelated to the CSRA procedures," direct action in the district court is available. *Id.* at 967. This case falls into the second category; Petitioners' facial constitutional challenge to 5 U.S.C § 3328 is not based on statutory rights conferred by the CSRA, but on Petitioners' rights under the Constitution. And under the D.C. Circuit's decision in *Hubbard*, 809 F.3d at 11, which the government's opposition fails even to cite, district court jurisdiction is available for Petitioners' equitable constitutional claims. The First Circuit's holding below is thus directly at odds with *Hubbard*, which the First Circuit acknowledged. *See* Pet. App. 12a n.4.

The government also fails to explain away the conflict with the Third Circuit's decision in *Mitchum v. Hurt*. *See* Opp. 14. The government characterizes

Mitchum as holding that only "in some circumstances" does the CSRA "not prevent a covered federal employee from seeking equitable relief for a constitutional employment claim." *Id.* at 14. However, the Third Circuit in *Mitchum* unequivocally held that the CSRA does not preclude district court jurisdiction over equitable constitutional claims even where the CSRA provided the employees a remedy. *Mitchum*, 73 F.3d at 35-36. The Third Circuit acknowledged that other circuits had come to a different conclusion, but it held that "on balance . . . the District of Columbia has taken a better course" because "[t]he power of the federal courts to grant equitable relief for constitutional violations has long been established" and "we should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* at 35 (citing *Hubbard*, 809 F.2d at 11). Thus, *Mitchum* is also contrary to the First Circuit's decision in this case, which deepened a longstanding circuit split acknowledged by seven circuits. *See* Pet. 14 & 14 n.2.

B. The district court has jurisdiction over Petitioners' claims because it has jurisdiction over "all civil actions arising under the Constitution," 28 U.S.C. § 1331, and Congress did not expressly remove that jurisdiction in the CSRA. *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006) (per curiam). The First Circuit majority here acknowledged that that the CSRA does not expressly preclude jurisdiction over Petitioners' constitutional claims, and the government does not argue otherwise. Pet. App. 6a.

There is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). Thus, as *Whitman* held, the proper question "is not whether [the CSRA] confers jurisdiction, but whether [the CSRA] removes the jurisdiction given to the federal courts." 547 U.S. at 514. Congress can eliminate district court jurisdiction under 28 U.S.C. § 1331, but it chose not do so in the CSRA. Indeed, in other statutes, Congress has explicitly stated that litigants may not bring actions in district court. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000) ("No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under [28 U.S.C. §] 1331."); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (jurisdiction of the Federal Mine Safety and Health Review Commission "shall be exclusive and its judgment and decree shall be final"). Thus, because the CSRA does not explicitly remove the district court's jurisdiction, the district court had jurisdiction here.

This Court has never addressed whether the CSRA precludes district court jurisdiction over equitable constitutional claims. As the government notes, this Court has held that the comprehensive nature of the CSRA is a factor counseling hesitation against extending *Bivens* damages remedies to federal employees seeking relief outside the CSRA. *Bush v. Lucas*, 462 U.S. 367, 380 (1983). However, the ability of federal courts to grant equitable relief to remedy constitutional violations is "inherent in the

Constitution itself" while monetary relief for constitutional injuries is a judicially created remedy. *Hubbard*, 809 F.2d at 11; *see Bivens*, 403 U.S. at 396; Pet. 25-26.

The government relies on *United States v. Fausto*, 484 U.S. 439 (1988), and *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989). To be sure, those cases held that the CSRA precluded statutory claims in the district courts. *Fausto*, 484 U.S. at 455 (CSRA precludes district court jurisdiction over statutory monetary claims under the Back Pay Act); *Karahalios*, 489 U.S. at 536 (no district court cause of action for enforcement of rights granted by the CSRA, in part in light of the CSRA's remedial scheme). Jurisdiction over statutory claims must be granted by Congress and "[t]he classic judicial task of reconciling many laws enacted over time . . . necessarily assumes that the implications of a statute may be altered by the implications of a later statute," which can therefore eliminate district court jurisdiction. *Fausto*, 484 U.S. at 453. However, jurisdiction over constitutional claims is "inherent in the constitution" and must be expressly eliminated by Congress (assuming that they can be eliminated at all). *Hubbard*, 809 F.2d at 11. *See also Fausto*, 484 U.S. at 455 (Blackmun, J., concurring) (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)).

The government suggests that the Court need not grant review because the question presented has already been resolved in cases such as *Bush*, *Fausto*, and *Karahalios*. Opp. 8-9. That is not so. As noted above, those cases did not concern whether and in what circumstances a federal statute may impliedly

divest the district courts of jurisdiction over constitutional claims seeking equitable relief. Indeed, the circuit split on the question whether the CSRA precludes district court jurisdiction over employees' equitable constitutional claims emerged *after* this Court decided both *Bush* and *Fausto*. *Hubbard* and *Mitchum* considered *Bush*, and *Mitchum* addressed *Fausto*. *Hubbard*, 809 F.2d at 1; *Mitchum*, 73 F.3d at 34. Neither decision considered this Court's prior rulings to have resolved whether the CSRA precludes equitable constitutional claims. Moreover, even the Second Circuit and the First Circuit below, which both decided the question favorably to the government, did not view the issue as preordained by this Court's decisions in *Bush* and *Fausto*. *Dotson*, 398 F.3d at 180; Pet. App. 11a-12a.

C. The government asserts that review should be denied because the question whether the CSRA precludes district court jurisdiction over equitable constitutional claims is "of limited practical importance" and "infrequently litigated." Opp. 15. The government states that it is aware of only one case since *Mitchum* in the Third Circuit "in which a federal employee has sought equitable relief in the district court . . . based on an allegedly unconstitutional employment-related action." *Id.* at 15 (citing *Rhodes v. Holt*, 2007 WL 1704653 (M.D. Pa. June 12, 2007)). However, in at least four other cases since *Mitchum*, a federal employee has brought an equitable constitutional claim against his or her employer in a district court in the Third Circuit.[1]

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[1] *Yu v. U.S. Dep't of Veterans Affairs*, 2011 U.S. Dist. LEXIS 71995 (W.D. Pa. July 5, 2011); *Reynolds v. Fed. Bureau of Prisons*,

In sum, the division among the circuit courts is deep and longstanding, and the question presented arises often. This Court's review is needed.

II. The CSRA Provides No Remedy for Petitioners' Constitutional Claims.

The government argues that the normal concerns over reading a federal statute to impliedly preclude district court jurisdiction over constitutional claims for equitable relief, *see Webster v. Doe*, 486 U.S. 592 (1988), are present only when the statutory scheme provides no constitutional remedy. Opp. 10. Because a remedy for Petitioners' claims exists under the CSRA, the government argues, there is no district court jurisdiction here. *Id.*

We disagree with the government's premise. As explained above, the district courts are open to constitutional claims unless Congress explicitly divests them of jurisdiction. But even taken on its own terms, the government's argument is incorrect because there is no remedy for Petitioners' constitutional claims under the CSRA.

The CSRA sends federal employees' claims to the Merit Systems Protection Board (MSPB), which lacks the power to strike down acts of Congress and lacks jurisdiction to review employees' terminations when there is an absolute statutory bar against the individual's employment, as there is here. *See Brooks v. Office of Pers. Mgmt.*, 59 M.S.P.R. 207, 215 n.7 (M.S.P.B. 1993); *Travaglini v. Dep't of Ed.*, 18

2010 U.S. Dist. LEXIS 19090 (E.D. Pa. Mar. 2, 2010); *Harold v. Barnhart*, 450 F. Supp. 2d. 544 (E.D. Pa. 2006); *Lei v. Brown*, 1997 U.S. Dist. LEXIS 15725 (E.D. Pa. Oct. 8, 1997).

M.S.P.R. 127, 137-38 (M.S.P.B. 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419 (M.S.P.B. 1984)). Indeed, the government regularly asserts that the MSPB lacks jurisdiction over employees' claims when there is an absolute statutory bar to their employment and consistently obtains summary judgment in the MSPB on that basis. *See, e.g.*, *Charner v. OPM*, 2009 M.S.P.B. LEXIS 1296 (M.S.P.B. Mar. 6, 2009); *Rivera v. Dep't of Veterans Affairs*, 2008 M.S.P.B. LEXIS 2056 (M.S.P.B. Mar. 31, 2008). Here, the First Circuit acknowledged that the MSPB cannot strike down a statute, and the government does not argue otherwise. Pet. App. 13a.

Instead, the government argues that the Federal Circuit could have exercised appellate review over Petitioners' claims despite the lack of MSPB jurisdiction and the lack of a factual record. *Id.* at 10. However, the Federal Circuit has held that its jurisdiction on appeals from the MSPB extends no further than the jurisdiction of the MSPB itself. *See Perez v. Merit Sys. Prot. Bd.*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits . . . were not before the MSPB for decision; nor are they before us."); *Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983). For example, in *Rosano*, the Federal Circuit refused to hear the merits of a constitutional free-exercise-of-religion claim because the MSPB lacked jurisdiction, holding that "the scope of the subject matter jurisdiction of [the Federal Circuit] is identical to the scope of the jurisdiction of the [MSPB]." *Id.*

The government notes that the Federal Circuit made an exception to this practice in *Briggs v. Merit*

Systems Protection Board, 331 F.3d 1307 (Fed. Cir. 2003). Opp. 13. *Briggs* held that "lack of a need to develop a factual record before adjudication" is a factor indicating that a legal issue may be justiciable for the first time on appeal. 331 F.3d at 1313. Petitioners' case on the merits here requires developing an extensive factual record on the changing role of women in the military to support its challenge to the continued viability of *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that limiting the Selective Service's registration requirement to men did not violate the due process clause of the Fifth Amendment). Accordingly, even under *Briggs*'s rationale, the Federal Circuit would have lacked jurisdiction to review Petitioners' claims.

The government claims that this Court has held that a court of appeals can adjudicate a constitutional claim on appeal from an administrative agency, even if the agency could not have considered it. Opp. 11. However, in both cases on which the government relies, *Thunder Basin*, 510 U.S. at 215, and *Shalala*, 529 U.S. at 23-24, the statute giving jurisdiction to the administrative body and appellate court expressly precluded review in the district court. When Congress expressly precludes judicial review in the district courts, there must be judicial review on appeal from an administrative tribunal to avoid the "serious constitutional question" that would arise if Congress completely precluded judicial review of constitutional claims. *Webster*, 486 U.S. at 603. As discussed above, it is undisputed here that the CSRA does not explicitly preclude district court jurisdiction, rendering *Thunder Basin* and *Shalala* inapposite.

III. Petitioners' Constitutional Claims Are Substantial.

Contrary to the government's assertion, Petitioners' claims on the merits are substantial. As for their first claim, Petitioners argue, and the district court acknowledged in its initial summary judgment decision, *see* Pet. App. 86a, that 5 U.S.C. § 3328 meets the three-part test for determining whether an act of Congress is a Bill of Attainder. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Group,* 468 U.S. 841 (1984). For a statute to be a Bill of Attainder, a specific individual or group must be singled out or identified by "immutable" conduct, the legislature must inflict punishment of a type historically imposed by Bills of Attainder, and the punishment must be imposed without a judicial trial. *Id.*

First, 5 U.S.C. § 3328 identifies a group by its conduct: men who did not register with the selective service. If the Office of Personnel Management first chooses to enforce the statute after their 26th birthday, men cannot change their conduct to avoid the punishments imposed by the statute. The statute at issue in *Selective Service System v. Minnesota PIRG* barred federal student loans for men who failed to register with the Selective Service. 468 U.S. at 844. That statute was held not to be a Bill of Attainder because it allowed a grace period for student loan applicants who had been notified that they had not registered with the Selective Service to then register and qualify for aid. *Id.* at 864. The statute at issue here, however, contains no such grace period, and the punishment is based on past, immutable conduct. 5 U.S.C. § 3328. Second, § 3328 inflicts punishment that

was historically imposed by Bills of Attainder: denial of employment. *See* 468 U.S. at 852. Finally, the punishment is imposed without a judicial trial. *See id.* at 847.

Petitioners' equal protection claim raises a substantial challenge to the continued viability of this Court's decision in *Rostker v. Goldberg*, 453 U.S. 57. That decision was premised on the then-"current thinking as to the place of women in the Armed Services" and the limits on the positions women could fill in the military. *Id.* at 71. Petitioners argue that *Rostker* should be revisited because the role of women in the military, society's perception of women in the military, and the nature of military needs have changed drastically in the thirty years since *Rostker*. The force of *stare decisis* is at its low point when the underlying facts are so changed that they can no longer justify the decision. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). Petitioners' equal protection claim presents such a case.

Since *Rostker*, nearly all positions in the military have become open to women. The statutory restrictions on women serving on combat ships and in combat aircraft cited by *Rostker* as justification for excluding women from Selective Service requirements have ended. 453 U.S. at 76 (citing 10 U.S.C. § 6015 (repealed 1993); 10 U.S.C. § 8549 (repealed 1991)). Unlike in 1981, women can now serve in 93 percent of all Army occupations. *See id.* at 81; Women in the U.S. Army: Today's Women Soldiers, http://www.army.mil/women/today.html (last visited Sept. 20, 2011). The percentage of the Army made up of women increased from 9.8 percent in 1983 to 15.5 percent in 2009. *Id.*

Having explained the substantiality of Petitioners' claims on the merits, it nevertheless bears emphasis that the merits are two steps removed from the issue now before the Court at the certiorari stage: whether to resolve a longstanding circuit split on an important jurisdictional question. If the Court grants review, it will decide that important jurisdictional question. And if the Court rules that the district court had jurisdiction over Petitioners' claims, it will remand to the First Circuit for a decision on those claims. For now, however, the government's diversionary foray into the merits puts the cart well before the horse.

CONCLUSION

The petition for a writ of certiorari should be granted.

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September 2011

JOINT APPENDIX

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No. 11-45

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,
Petitioners,

v.

DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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Petition For Certiorari Filed July 7, 2011
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United States District Court
District of Massachusetts (Boston)
CIVIL DOCKET FOR CASE #: 1:07-cv-12391-DPW

Relevant Docket Entries

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02/07/2008	7	47	First AMENDED COMPLAINT against all defendants *and Class Action Claim*, filed by Aaron Lawson, Henry Tucker, Christon Colby, Michael B. Elgin.(Schwartz, Harvey) (Entered: 02/07/2008)
04/28/2009	56		Opposition re 52 MOTION for Reconsideration re 42 Order on Motion to Dismiss, Order on Motion for Leave to File, Order on Motion for Partial Summary Judgment, Order on Motion for Summary Judgment, Order on Motion to Strike filed by Michael B. Elgin, Aaron Lawson, Henry Tucker, Christon Colby. (Attachments: # 1 Exhibit 1: Agency Response, # 2 Exhibit 2: MSPB Decision, # 3 Exhibit 3: Elgin Standard Form 50) (Schwartz, Harvey) Modified text on 4/28/2009 (Seelye, Terri). (Entered: 04/28/2009)
06/03/2009	64	139	STATUS REPORT by U.S. Dept. of the Interior, United States of America, Treasury, United States Department of the. (Serafyn, Jennifer)

(Entered: 06/03/2009)

10/16/2009	68	141 STATUS REPORT by George Bush, Dirk Kempthorne, U.S. Dept. of the Interior, United States of America, Treasury, United States Department of the, Henry M. Paulson, Jr. (Attachments: #1 Exhibit Exhibit A: Example letter) (Wichers, Christine) (Entered: 10/16/2009)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No.
07-2391DPW
(Filed Feb. 7, 2008)

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER and CHRISTON COLBY on behalf of themselves and similarly situated men throughout the United States

Plaintiffs,

v.

GEORGE W. BUSH, individually and in his official capacity as President of the United States; HENRY M. PAULSON, JR., individually and in his official capacity as Secretary of the Treasury; DIRK KEMPTHORNE, individually and in his official capacity as Secretary of the Interior; UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE TREASURY; and UNITED STATES DEPARTMENT OF THE INTERIOR

Defendants

FIRST AMENDED CLASS ACTION COMPLAINT

Introduction

1. In this civil action, four exemplary federal employees fired solely because they had failed to register with the Selective Service System many

years earlier when they were eighteen years old challenge the constitutionality of the federal law that required their firings. They bring this action on behalf of themselves and hundreds of thousands of other men fired from or forever barred from federal employment. They allege that the statute at issue, 5 U.S.C. § 3328, constitutes a Bill of Attainder prohibited by Art. I, § 9, cl. 3 of the Constitution, and also that the requirement of the Military Selective Service Act, 50 U.S.C. § 453, *et. seq.*, that young men, but not women, must register is an anachronism that unconstitutionally discriminates on the basis of gender.

2. Michael Elgin, a 42-year-old man with 17 years of service with the Internal Revenue Service, was fired solely because he had not registered with the Selective Service System when he was eighteen years old. Aaron Lawson, a 32-year-old employee of the Bureau of Land Management ("BLM"), was notified his employment is to be terminated because the Selective Service System has no record that he registered when he was 18 years old. Henry Tucker, a 37-year-old man who worked for the Federal Deposit Insurance Corporation for 17 years, was offered a transfer to the National Institute of Health but, when it was learned that he had not registered with the Selective Service System, the offer was withdrawn and his FDIC employment is now to be terminated. Christon Colby, a 32-year-old man with more than 5 years of exemplary service with the Internal Revenue Service, was fired solely because he had mistakenly failed to register with the Selective

Service System.

3. Simply put, the complaint alleges that if Mr. Elgin, Mr. Lawson, Mr. Tucker and Mr. Colby were woman and not men they would have retained their federal employment. The requirement that young men, but not young women must register on their eighteenth birthday exposes men, but not women, to serious penalties and punishments throughout their lifetimes. While this gender-based discrimination may once have been justified by the exclusion of women from large segments of military service, this justification has disappeared as more than 200,000 women presently serve in virtually all positions in the military.

4. The plaintiffs seek class certification on behalf of all men who failed to register with the Selective Service System prior to their 26th birthdays and a declaratory judgment that the 5 U.S.C. § 3328 prohibition against their federal employment constitutes a Bill of Attainder. The plaintiffs also seek a declaratory judgment that the Military Selective Service Act requirement that men, but not women, must register with the Selective Service System violates the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment. The plaintiffs further seek injunctive relief reinstating them and all class members dismissed from federal service to their positions with the federal government.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1343 (civil rights), and 28 U.S.C. § 1346 (U.S. defendant). Claims are asserted pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedures Act, 5 U.S.C. § 702. This Court further has jurisdiction to review a constitutional violation caused by a federal employee pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

6. Mr. Elgin appealed his dismissal to the Merit Systems Protection Board, alleging both that his dismissal violated the constitutional prohibition against Bills of Attainder and that the dismissal discriminated against him on account of his gender. The MSPB ruled that it lacked jurisdiction to hear his appeal since the termination was based on a statutory bar to federal employment. Because the MSPB appeal constituted a "mixed" claim, in that it included an allegation of illegal discrimination, this Court has jurisdiction to review this matter, pursuant to 5 U.S.C. § 7703(b)(2).

7. Venue is proper pursuant to 28 U.S.C. §§ 1391(b) and 1402(a).

PARTIES

8. The plaintiff Michael Elgin is a male United States citizen and resident of the Commonwealth of Massachusetts. He is 42 years old. He was last employed by the Internal Revenue Service.

9. The plaintiff Aaron Lawson is a male United States citizen and resident of the State of California. He is 32 years old. He was last employed by the Bureau of Land Management.

10. The plaintiff Henry Tucker is a male United States citizen and a resident of the District of Columbia. He was last employed by the Federal Deposit Insurance Corporation.

11. Plaintiff Christon Colby is a male United States citizen and resident of the State of Michigan. He is 32 years old. He was last employed by the Internal Revenue Service.

12. The defendant George W. Bush is President of the United States and, as such is the head of the Executive Branch of the United States government. He is named in his official capacity on all counts and is named individually on the claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

13. The Defendant Henry M. Paulson, Jr. is named in his official capacity as Secretary of the Treasury on all counts and is named individually on the claim pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The Internal Revenue Service is a component of the Department of the Treasury.

14. The Defendant Dirk Kempthorne is named in his official capacity as Secretary of the Interior on all counts and is named individually on the claim pursuant to *Bivens v. Six Unknown Named Agents*

of Federal Bureau of Narcotics, 403 U.S. 388 (1971). The Bureau of Land Management is a component of the Department of the Treasury.

15. The defendants United States of America, United States Department of the Treasury and United States Department of the Interior are subject to suit pursuant to the Administrative Procedures Act, 5 U.S.C. § 702, and 5 USCS § 7703.

Class representatives

16. The plaintiffs seek certification of this action as a class action pursuant to Fed. R. Civ. P., Rule 23.

17. The plaintiffs request that two plaintiff classes be certified, as follows.

    a. First, that a class be certified consisting of all male citizens and male legal residents of the United States age 26 and above whose registration is not on record with the Selective Service System and who, within the three years prior to the filing of this action, were removed from employment with an executive Branch agency because of such failure to register. As to this class the plaintiffs seek injunctive and equitable relief, including reinstatement and back pay.

    b. Second, the plaintiffs request that a broader class be certified consisting of all male citizens and male legal residents of the United States age 26 and above whose registration is not on record with the Selective Service System. As to this class the plaintiffs seek declaratory relief

that would remove the bar to their federal employment.

c. As to both classes, the plaintiffs also seek declaratory relief finding that the mandatory registration of men, but not women, violates the Equal Protection and Due Process provisions of the Fifth and Fourteenth Amendments.

18. The plaintiffs' claims satisfy all the prerequisites stated in Rule 23(a):

a. Members of both classes are so numerous that joinder of all members is impracticable. In support of this contention the plaintiffs refer to the 2006 Annual Report of the Selective Service System which states that as of 2006, some 93 percent of all males ages 18 through 25 had registered with the Selective Service System, primarily because 33 states have mandatory automatic registration through their motor vehicle departments. The Selective Service System reported that there were some 15,286,197 men in that age class. Based on the System's registration numbers, in 2006 some 7 percent of American males – 1,070,034 men – in the age range required to register failed to do so. Similar cohorts of men who reached age 26 without registering in each of the previous years since registration was reinstated in 1985 are also class members. All of those men are barred from Executive Branch employment. As they reach age 26, these men are unable to register with the Selective Service System and

are irrevocably barred from Executive Branch employment for the remainder of their lives. Those who were hired by Executive agencies are subject to termination.

b. The legal claims brought by the plaintiffs in regard to the constitutionality of both 5 U.S.C. § 3328 and mandatory registration for men, but not for women, are identical for the plaintiffs and all class members. All such claims have common questions of law and fact.

c. The claims of the representative parties are typical of the claims of all members of the class.

d. In contrast to class certification, prosecuting similar actions separately by various members of the proposed classes could lead to the establishment of inconsistent legal standards and incompatible standards of conduct for the federal defendants.

e. Further, adjudications with respect to individual class members would, as a practical matter, be dispositive of the interests of the other members not parties to the individual adjudications.

f. The federal government defendants have acted on grounds that apply generally to the class so that final injunctive and declaratory relief is appropriate respecting the class as a whole.

g. The representative parties will fairly and adequately protect the interests of the class. The plaintiffs seek declaratory and injunctive

relief that will benefit all class members. Further, the plaintiffs are represented by counsel who are competent and experienced in constitutional and civil rights litigation.

19. Because of the above factors, plaintiffs suggest that this action should be certified, pursuant to Rule 23©, as a class action as requested above.

FACTS

The Selective Service System

20. The Selective Service System is an independent agency within the Executive Branch of the federal government, established by 50 U.S.C. § 460. It is not a part of the Defense Department.

21. The Military Selective Service Act, 50 U.S.C. § 453, *et. seq.*, requires all males between the ages of 18 and 26 to register with the Selective Service System during the 60-day period beginning 30 days before their eighteenth birthday.

22. Men are barred from registering with the Selective Service after their twenty-sixth birthday.

23. It is a crime for a man to fail to register with the Selective Service System. The punishment for failing to register within thirty days of a man's eighteenth birthday is a fine of up to $10,000 and imprisonment for up to five years, pursuant to 50 U.S.C. § 462. Men charged with this crime are entitled to a trial and all substantive and procedural rights of those accused of crimes. Woman, because they are not required to register, are not subject to this fine or imprisonment.

24. In addition to the criminal penalties for failing to register, men who fail to register with the Selective Service System are ineligible for a host of federal benefits, including federal student financial aid such as Pell grants and guaranteed student loans, job training under the federal Workforce Investment Act and U.S. citizenship for male immigrants. Women are not subject to these disqualifications from participation in federal programs or employment.

25. As applicable to the present action, men who fail to register with the Selective Service System within thirty days of their eighteenth birthdays are barred from employment with a federal Executive branch agency for the duration of their lifetimes, pursuant to 5 U.S.C. § 3328.

26. This statutory bar to federal employment, 5 U.S.C. § 3328, was enacted in 1987. The sponsor of the bill, Sen. Strom Thurmond, described the bar as a means of punishing "unpatriotic" men, saying that "if an individual refuses to recognize any responsibility to his country or to its citizens, and refuses to register with the Selective Service as required by law, then that individual should be barred from Federal civil service employment. It is really that simple. To permit such individuals to enjoy the privileges and benefits of civil service positions is not only unfair to taxpayers, it is unpatriotic." Sen. Samuel Nunn questioned the lifetime bar on federal employment yet commented that "I want to emphasize there ought to be sanctions and people ought to register. I think that

is what the people are trying to bring about. I agree with that purpose."

27. The statutory bar to Executive Branch employment applies to all men who fail to register with the Selective Service System, whether or not a man has been charged with the crime of failing to register and whether or not a man has been convicted of that crime. The statute provides no right to a trial or a hearing before the bar to Executive Branch employment is imposed.

28. Although all men are required to register with the Selective Service System, no persons have been drafted into the military since July 1, 1973, pursuant to 50 U.S.C. § 467. Neither the President nor the Director of the Selective Service System has authority to institute a draft. Reinstitution of the military draft requires an act of Congress and approval by the President.

Facts Regarding Mr. Elgin

29. At the time of his eighteenth birthday, Mr. Elgin was a struggling high school student, living a hand-to-mouth existence after being ejected from his family home. He lived precariously, staying with friends and relatives and, at times, living in a car. He was the father of a baby boy when he was fourteen years old and he worked continuously through high school to meet his financial and emotional responsibilities as a father. Despite these hurdles, Mr. Elgin was determined to support his son and to graduate from high school, which he managed to accomplish.

30. Because of this tumultuous existence, Mr. Elgin

was unaware of the law requiring young men to register with the Selective Service within thirty days of their eighteenth birthday. He did not ever register.

31. Mr. Elgin was hired by the Internal Revenue Service in 1991 and initially worked as a low-level data transcriber in Andover, Massachusetts. The IRS conducted a routine security investigation when Mr. Elgin was hired and gave him a favorable determination. Since that time, he received repeated promotions to positions with increasingly greater responsibility. Throughout his career at the IRS he received glowing praise and evaluations and was an exemplary employee.

32. As part of a routine background investigation when he was proposed for a further promotion in 2002, the IRS learned that Mr. Elgin had not registered with the Selective Service. The matter was forwarded to the federal Office of Personnel Management ("OPM"), as required by the applicable regulations.

33. Despite his failure to register with Selective Service when he was 18 years old, in January 2007, the IRS found that Mr. Elgin had passed its background investigation and his security status was raised from "low risk" positions to "moderate risk" positions.

34. OPM determined that Mr. Elgin's failure to register was willful and knowing and that he was ineligible for federal employment, pursuant to 5 U.S.C. § 3328. The IRS requested that OPM

reconsider and find that Mr. Elgin's failure to register was an inadvertent mistake. The IRS wrote to OPM that Mr. Elgin

> has an exemplary record with the IRS and is a valued and trusted employee whose loss would negatively impact his fellow employees, the employees he supports daily and management. Both Senators from Massachusetts have requested the IRS to issue an eligibility waiver that would allow Mr. Elgin to be retained as an employee of the IRS. The IRS joins in that request to OPM.

35. Nonetheless, on February 22, 2007, OPM denied the IRS' request and affirmed its finding that Mr. Elgin was ineligible for Executive agency employment.

36. On July 18, 2007, the IRS wrote to Mr. Elgin that because of the final decision by OPM concerning his ineligibility for employment, his employment would be terminated as of July 27, 2007. His employment terminated on that date.

37. Mr. Elgin appealed his termination to the Merit Systems Protection Board ("MSPB") on the grounds (1) that the statutory basis for his dismissal, 5 U.S.C. § 3328, constituted a Bill of Attainder and (2) that his termination discriminated against him on account of his gender. On November 16, 2007, the MSPB Administrative Judge allowed the IRS' motion to dismiss the appeal on the ground that because of

the statutory bar to employment, the MSPB lacked jurisdiction to hear the appeal. The MSPB decision became final on December 21, 2007.

38. Mr. Elgin's son, who was a baby when Mr. Elgin was in high school, served an eighteen-month tour of duty with the U.S. Army in Iraq.

Facts regarding Mr. Lawson

39. Mr. Lawson believes that he registered with the Selective Service System at the time of his 18th birthday by going to the Post Office in Norco, California, where he lived at the time, and completing the necessary forms. However, the Selective Service System has no record of such registration.

40. He has served as a civil servant since 1997, first as a volunteer firefighter in the California Department of Forestry and later with the United States Department of Agriculture U.S. Forest service. In 2003, he accepted a position with the Bureau of Land Management. At that time he learned that the Selective Service System has no record of his registration.

41. Mr. Lawson is a specialist in directing helicopters, engines and their crews in fighting forest fires. He regularly risks his life fighting wild fires, including the recent Esperonza fire in the San Bernadino National Forest in which five firefighters, friends of Mr. Lawson's, were killed. The government has spent tens of thousands of dollars training Mr. Lawson. The termination of his employment and the loss of such an experienced professional will

place lives and property in jeopardy. Forest fires do not care whether the people who fight them registered with the Selective Service.

42. Even though the Bureau of Land Management requested a waiver from the Office of Personnel Management for Mr. Lawson, that request was denied and Mr. Lawson has been notified that his federal employment is to be terminated because there is no record of his having registered with the Selective Service System.

Facts Regarding Mr. Tucker

43. Mr. Tucker's mother left him when he was sixteen years old and he moved from place to place throughout his teenage years. He was not aware that he was required to register with the Selective Service System when he was 18 years old. He never registered with Selective Service.

44. Mr. Tucker worked for the Federal Deposit Insurance Corporation for 17 years in positions of increasing responsibility. His last position was as a Financial Institution Specialist.

45. In 2007, the FDIC learned that Mr. Tucker had not registered with the Selective Service System and referred the matter to the Office of Personnel Management.

46. After that, Mr. Tucker applied for a position with the National Institutes of Health and, in December 2007, was offered a position there as a Budget Analyst. When the NIH contacted the FDIC, it learned that Mr. Tucker had not registered with

the Selective Service. After learning that information, the employment offer was withdrawn.

Facts Regarding Mr. Colby

47. Mr. Colby moved out of his parents' home at the age of 18. Mr. Colby never received any notices in the mail or otherwise explaining the requirement to register for Selective Service nor was he aware of his obligation to do so.

48. Mr. Colby was unaware of the law requiring young men to register with the Selective Service within thirty days of their eighteenth birthday. He did not ever register.

49. Mr. Colby first learned of the requirement of Selective Service registration in approximately December 2001 when he was working as a temporary employee at the IRS through a staffing company.

50. When he learned of the Selective Service requirement, Mr. Colby contacted the Selective Service and was notified that he did not have a Selective Service number and that he could no longer register because he had already reached age 26.

51. Mr. Colby began his employment with the Internal Revenue Service on May 20, 2002. He informed the IRS that he had never registered with the Selective Service.

52. The IRS hired Mr. Colby following a routine background check and despite knowing that he had not registered for Selective Service.

53. Mr. Colby was initially hired by the IRS as a Computer Operator. During his employment with the IRS, he received consistently excellent performance reviews and numerous promotions to positions with greater responsibilities.

54. On June 25, 2003, the IRS notified Mr. Colby that it had become aware of his failure to register for Selective Service.

55. On July 2, 2003, Mr. Colby wrote a letter to the Office of Personnel Management explaining why his failure to register was not knowing and willful. Mr. Colby explained that he was unaware of his obligation to register until it was too late.

56. In accordance with 5 C.F.R. § 300.707, the personnel office for Mr. Colby's operations branch submitted a request to the Office of Personnel Management to determine whether Mr. Colby's failure to register was knowing and willful.

57. On February 16, 2006, the Office of Personnel Management issued a letter setting forth its conclusion that "Mr. Colby's explanation that his failure to register was not knowing and willful fails to meet the preponderance of evidence standard." OPM's letter does not contain any analysis or reasoning in support of this conclusion.

58. After receiving the OPM's decision, Mr. Colby's supervisor sent a letter to the director of OPM, requesting that the OPM reopen and reconsider its determination with regard to Mr. Colby's eligibility for an appointment to a position with the IRS. The IRS's letter attested to Mr. Colby's integrity and

value as a skilled and experienced IRS employee as follows:

> Christon Colby's value as an employee is reflected in his evaluation. He rated a 4.8 out of a possible 5.0. The narrative contains numerous accolades as to his ability to deal well with our customers, handle and prioritize his work schedule, work well both within both his work group and within the Branch. If I were to lose him then I will also lose a valuable and congenial employee (the kind that is hard to come by these days). Christon is an extremely valuable and integral part of my staff. I have over 160 employees, spread over 9 cities, contained in 14 separate units of operations. They work in an environment that requires good personnel skills, self motivation, a can do attitude, and intelligence. These are skills that Christon has and are hard to find in people. If I lose him, his work load falls to the others in his unit and becomes a burden for them until a replacement is identified and trained well enough to take over what was lost.
>
> Since Christon was hired, the IRS has invested in excess of $25,000 into his education to perform in his role as an Information Technology

Specialist, System Administrator. He has received this classroom training, on-site, while working here at the Enterprise Computing Center, Detroit, Michigan, over the last 9 months. He is currently responsible for the Operations and Maintenance of assigned applications housed on highly sophisticated Sun Servers kept here at the Center. If I were to lose Christon, I will be forced to post his vacant position, losing valuable time and putting a burden upon others on my staff to carry his work load which is critical to the IRS businesses. I will have to provide the staff to rank the package when it is returned from Human Resources, provide the staff to interview any possible candidates, make that selection and then begin the tedious and expensive task of (re-)training that individual to fill in behind someone that I had already invested so much time, sweat equity, nurturing, and money. Let's also not lose sight of the fact that I will have lost the time that Christon would have continued to work, continued to learn, and continued to contribute to my organization.

> Director Springer, I am requesting a waiver concerning the condition of employment that is now before you. I believe Christon has a bright future at the IRS and am appealing to you that we are allowed to retain Christon Colby as an employee.

59. On February 22, 2007, the Director of OPM, issued a final determination letter concluding that the evidence in Mr. Colby's case was "insufficient to overcome the statutory presumption that your failure to register was knowing and willful."

60. On July 30, 2007, the IRS, through Rick Ware, the Director of the Enterprise Computing Center, informed Mr. Colby that his employment would be terminated effective August 3, 2007.

61. Mr. Colby's last day of employment with the IRS was July 30, 2007.

62. During his freshman year of college, at the age of 19, Mr. Colby considered enlisting in the Navy because his father had served in the Navy during the Vietnam War and he wanted to follow in his father's footsteps. Mr. Colby visited a Navy recruiting office and a recruiter visited his parents' house to discuss his interest in the Navy. Mr. Colby's selective service status was never discussed during these meetings and the Navy recruiter never indicated to Mr. Colby that he did not have a Selective Service number.

63. Mr. Elgin, Mr. Lawson, Mr. Tucker and Mr. Colby were all valuable federal employees. There was no

cause for their terminations except for their failures to have registered with the Selective Service System and their gender.

The Role of Women in the Military Has Changed in Recent Years

64. There remains no military justification for the requirement that men, but not women, be registered with the Selective Service System.

65. All men between the ages of 18 and 26 residing in the United States are required to register with the Selective Service System, regardless of their physical or mental condition or their fitness for service in the military. The Selective Service advises that a friend or relative help a disabled man complete the registration form if he is unable to do so himself. Such disabled men are not eligible to serve in the military. The registration requirement is without regard to men's actual ability or eligibility to serve in the military in any capacity.

66. Conversely, all women, no matter their fitness or ability to serve in the armed forces, are excluded from registration.

67. The requirement that men unfit for service must register with the Selective Service and the prohibition against registration by women who are well qualified to serve in the military serves no important governmental objective nor is this distinction between men and women substantially related to the achievement of any important governmental objective. This statutory scheme ignores the crucial role that women play in

today's military. Instead, the male-only registration requirement is, as the Supreme Court commented in a similar context, based on "overbroad generalizations about the talents, capacities, or preferences of women."

68. The role of women in the military has changed dramatically in recent years. For example, virtually all positions in the Navy, the Coast Guard and the Air Force are now open to women. Women serve on Navy combat ships and fly Navy and Air Force combat aircraft. Women serve in 92 percent of occupations in the Army. Some 80 percent of military job titles are open to women. Women make up 15 percent of the armed forces and as high as 18 percent of lower enlisted ranks and junior officer ranks. More than 200,000 women presently serve in the United States military. The percentage of the armed forces represented by women has increased from 1.6 percent in 1973 to 8.4 percent in 1980 to 15 percent at present. In fact, the Department of Defense is the largest single employer of women in the country.

69. All branches of the armed forces actively recruit women and seek to induce them to enlist voluntarily. All branches of the military have recruiting material specifically targeted at women emphasizing the benefits and opportunities for women in the military and the contributions women make to the armed forces. Women make up 20 percent of new recruits.

70. Women attend all of the military service academies. In 2001, women were 16 percent of the

graduating class of West Point, 18 percent of the graduating class of the Air Force Academy. 17 percent of the graduating class of the Naval Academy, and 25 percent of the graduating class of the Coast Guard Academy.

71. Women have served more than 170,000 tours of duty in the current war in Iraq, constituting approximately one in seven of all military personnel deployed. The percentage of women serving in Iraq is four times the percentage of women who served in the 1991 Persian Gulf war. For example, nearly one-fourth of all Army intelligence personnel are women. Despite statutory limits on women being assigned to front line combat positions, the Army has awarded thousands of Combat Action Badges to women fighting in Iraq and Afghanistan. The Department of Defense states the purpose of the Combat Action Badge as providing "special recognition to Soldiers who personally engage the enemy, or are engaged by the enemy during combat operations." http://www.army.mil/symbols/combatbadges/Action.html. More than ninety-four American servicewomen have been killed in Iraq.

72. A recent Rand Corporation study of the role of women in the military forces serving in Iraq concluded that women were actively involved in routine self-defense missions that included providing security for their own units, providing personal security for leadership, and, in some cases, providing security for other support units. In fact, this study, funded by the Department of Defense, concluded that insurgents were more

likely to target the type of units to which women are assigned than the direct combat units to which women are not directly assigned.

73. The acceptance of women's service in the war in Iraq is reflected by the common usage of the term "men and women" when referring to American troops in Iraq. References to American troops in Iraq only as "men" has become rare at all levels of society, including the top levels of government.

74. The Selective Service System acknowledges that if given the mission and additional funding, it is capable of registering and drafting women with its existing infrastructure.

75. The military would be unable to perform its missions in Iraq and Afghanistan but for the American women serving in those countries.

COUNT ONE
Bill of Attainder

Plaintiff realleges the foregoing paragraphs.

76. The prohibition against Executive agency employment for men who failed to register with Selective Service is a punishment imposed by Congress on men deemed disloyal and unwilling to defend the nation.

77. A bar to specific kinds of employment, such as the prohibition against Executive agency employment at issue, is the type of punishment historically imposed by bills of attainder and bills of pains and penalties.

78. The Military Selective Service Act, 50 U.S.C. § 451, permits registration only for men between

the ages of 18 and 26. As a result, at the time Mr. Elgin, Mr. Lawson, Mr. Tucker and Mr. Colby were first informed that they would be fired, when each was older than 26, they were legally incapable of registering with the Selective Service.

79. The punishment imposed by 5 U.S.C. § 3328, barring Mr. Elgin, Mr. Lawson, Mr. Tucker and Mr. Colby, among others, from Executive agency employment, was inflicted without trial or the right to trial.

80. The punishment imposed by 5 U.S.C. § 3328 is inflicted on an easily identifiable group of men born after December 31, 1959 who did not register with the Selective Service System. In fact, to facilitate the determination of whether a man falls within the group on whom the bar to employment is imposed, the Selective Service System established an online query facility at which by entering a man's last name, Social Security number and date of birth, information is instantly provided as to whether or not he registered with Selective Service. That query service is online at https://www.sss.gov/RegVer/wfVerification.aspx. By means of this service it can be instantly determined whether a man falls within the group on which the statutory bar to employment is imposed.

81. As a result of the above, the statutory bar to Executive agency employment imposed by 5 U.S.C. § 3328 is a Bill of Attainder, prohibited by Art. I, § 9, cl. 3 of the United States Constitution.

COUNT TWO
Equal Protection Violation

Plaintiff realleges the foregoing paragraphs.

82. Were the plaintiffs female rather than male, they would not have been terminated from federal employment.

83. While at the time of its enactment, the male-only registration requirement may have been justified by the limited and nonessential role played by women in the armed forces at that time, the role of women has changed dramatically in recent years. Because of the vital, crucial and essential tasks performed by women in today's military, there is no longer any logical or legal justification for limiting Selective Service registration to men. The present scheme in which men with physical and mental infirmities making them ineligible for military service are required to register, while physically fit and mentally capable women are barred from registration neither serves important governmental objectives nor is substantially related to achievement of those objectives.

84. The Military Selective Service Act, 50 U.S.C. § 453, *et. seq.*, requirement that only men must register with the Selective Service, and the prohibition against Executive agency employment imposed by 5 U.S.C. § 3328 for men, but not women, who fail to register violates the plaintiffs' right to the Equal Protection of the laws under the Fifth and Fourteenth Amendments to the United States Constitution.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that this Court grant the following relief against the federal defendants pursuant to the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the Administrative Procedures Act, 5 U.S.C. § 702, and 5 U.S.C. ¤ 7703(b)(2), and against the individual defendants pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971):

1. A declaratory judgment that 5 U.S.C. § 3328 constitutes a Bill of Attainder in violation of Art. I, § 9, cl. 3 of the United States Constitution.

2. A declaratory judgment that 50 U.S.C. § 451, *et. seq.* and 5 U.S.C. § 3328 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, as applied to the federal government by the Fifth Amendment to the United States Constitution, in that they place burdens and penalties on men that are not placed on women, in that they stigmatize women as ineligible for required service to their country in time of need, in that they require young men, but not young women, to continuously report their residence to the government, and in that they distinguish between men and women based on archaic stereotypes and misconceptions, to the detriment of men and women and the national welfare.

3. A preliminary injunction prohibiting the

defendants from implementing or enforcing the provisions of 5 U.S.C. § 3328 and requiring the reinstatement of the plaintiffs to their federal employment.

4. A permanent injunction prohibiting the defendants from implementing or enforcing the provisions of 5 U.S.C. § 3328 and requiring the reinstatement of plaintiffs and all class members discharged from federal employment, with full back pay and benefits.

5. Attorneys' fees and costs and expenses pursuant to 42 U.S.C. § 1988, 28 U.S.C. § 2412 and Fed.R.Civ.P., Rule 23(h).

6. Such other and further relief as this Court deems appropriate.

Michael Elgin, Aaron Lawson, Henry Tucker and Christon Colby,
Plaintiffs and class representatives,
By their attorneys,

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NORTHEASTERN REGIONAL OFFICE

DOCKET NUMBER

PH-0752-08-0004-I-1

DATE: October 31, 2007
(Filed in Dist. Ct. Apr. 28, 2009)

MICHAEL ELGIN,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Agency.

AGENCY RESPONSE AND REQUEST TO DISMISS FOR LACK OF JURISDICTION

On September 28, 2007, Michael Elgin (Appellant) filed an appeal challenging the decision of the Department of the Treasury, Internal Revenue Service (Agency) to terminate him from his position as a GS-2210-11 Information Technology Specialist based on

his ineligibility for Executive Agency Appointment as a result of his failure to register for Military Selective Service. Appellant's termination was effective July 27, 2007. Appellant's appeal challenges the constitutionality of "5 USC § 3328 which bars any male who failed to register with (*sic*) Selective Service between ages 18 and 26 from appointment to any position in an Executive agency" on the grounds that the statute "illegally against men on the basis of their gender . . . plac[ing] burdens on men that are not placed on women . . . and as a bill of attainder in violation of the Constitution of the United States . . . ." Appellant's petition for Appeal, Response to Question 6.

For the reasons set forth fully below, the Agency hereby requests that the Board dismiss the above-captioned case lack of jurisdiction as the action involved does not fall within the jurisdiction of the Merit Systems Protection Board (MSPB).

I. STATEMENT OF FACTS

Appellant was employed as an Information Technology Specialist at the Internal Revenue Service, Modernization & Information Technology Services (MITS), Andover Campus, Andover, Massachusetts. He began his employment with the IRS as a Data Transcriber on February 11, 1991 and certified that he had registered with the Selective Service System. AF, Tabs 40 and P. On September 24, 1992, he received a favorable security determination on his background investigation. AF, Tab 4N. On January 27, 2002, he was competitively selected for a moderate risk position which required a more extensive background investigation during which Appellant was required to

complete Standard Form (SF) 85P (Questionnaire for Public Trust positions). It was discovered during this background investigation that Appellant had not registered with the Selective Service. AF Tabs 4J-K. Appellant did disclose on the SF 85P that he had not registered for the Selective Service. AF Tab 4K, Q. 17 at p. 6). As Appellant was born in 1965, he is over the age of 26 and is no longer able to register for the Selective Service. AF, Tab 4A.

Pursuant to 5 U.S.C. § 3328(a), males born after December 31, 1959 are required to register for the Selective Service, and who fail to register, are ineligible for appointment to a position in an Executive agency, if the failure to register was knowing and willful. 5 USC § 5538 (b) provides that the Office of Personnel Management (OPM), in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. OPM has prescribed such regulations, which are set forth in 5 CFR, Chapter I, Subchapter B, Part 300, Subpart G. *See generally*, 5 C.F.R. § 300. 701, et. seq.

By letter dated November 12, 2003, Appellant was notified by William Conway, Manager, Andover Territory (MITS) that because he had failed to register with the Selective Service, he was ineligible for appointment to a position with the Agency unless he could establish that his failure was neither knowing nor willful. Appellant was advised that if he notified the Agency in writing of his reasons for failing to register for the selective service, the Agency would hold his termination in abeyance until a decision was received from OPM as to whether his failure to register was neither knowing nor willful. AF, Tab 4J. Appellant timely submitted a statement to the Agency setting

forth his position that his failure to register was neither knowing nor willful.

Pursuant to 5 C.F.R. § 300.705(d) (2), by letters dated December 9, 2003 and April 28, 2004, all of the information, relating to Appellant's failure to register for the Selective Service was forwarded to OPM for a determination as to whether his failure to register was neither knowing nor willful. AF, Tab 4J.

OPM responded on February 6, 2006, determining that Appellant had failed to prove by a preponderance of the evidence that his failure to register for the Selective Service was neither knowing nor willful. AF, Tab 4F. OPM concluded that as a result, Appellant was ineligible for appointment to his federal position and advised the Agency to take corrective action by terminating Appellant's employment. *Id.* OPM further advised that pursuant to 5 CFR 300.706 (d), the Agency could request OPM to reopen and reconsider its determination. AF, Tab 4F.

On July 19, 2006, the Agency asked OPM to reopen and reconsider its decision, stating:

> This letter serves as such a request to reconsider Mr. Elgin's failure to register as an inadvertent mistake not a knowing and willful act. Attached is a more detailed explanation from Mr. Elgin of the circumstances of his life. Mr. Elgin has an exemplary record with the IRS and is a valued and trusted employee whose loss would negatively impact his fellow employees, the employees he supports daily and management. Both Senators from Massachusetts have requested the IRS to

> issue an eligibility waiver that would allow Mr. Elgin to be retained as an employee of the IRS. The IRS joins in that request to OPM.

AF, Tab 4D.

By letter dated February 22, 2007, OPM denied the Agency's request to reconsider its determination that Appellant's failure to register with the Selective Service was knowing and willful. AF Tab 4C.

On July 18, 2007, the Agency wrote to Appellant:

> You received Notice on February 22, 2007 that you were ineligible for appointment with an Executive Agency due to your failure to register for Military Selective Service. The Agency previously requested a waiver from the Office of Personnel Management (OPM) on your behalf. The final response from OPM (attached) has been received by the Internal Revenue Service (IRS).
>
> Based upon the decision issued by OPM, your services to the IRS are terminated[1] effective July 27, 2007 . . . .

AF, Tab 4C

On or about September 28, 2007, Appellant filed the instant appeal with the MSPB over his termination[2].

---

[1] OPM's regulations titled "Statutory Bar To Appointment Of Persons Who Fail To Register Under the Selective Service Law" provide that an individual who is required to be registered but who is not registered will be terminated by his agency. 5 CFR § 300.707.

[2] As set forth herein, Appellant's appeal is not within the scope of Board jurisdiction, accordingly the issue of whether or not his

II. DISCUSSION

Appellant has the burden of proving Board jurisdiction over his appeal. *Morales v. Department of Defense,* 54 M.S.P.R. 226, 229 (1992). He is only entitled to a jurisdictional hearing if he makes a non-frivolous allegation that the Board has jurisdiction. *Ferdon v U.S. Postal Service,* 60 M.S.P.R. 325, 329 (1994). The Appellant has not made and cannot make a non-frivolous allegation that the Board has jurisdiction in the instant circumstances.[*]

Appellant seeks Board review of OPM's determination that, he is ineligible for appointment with Executive agencies of the Federal Government because he failed to show by a preponderance of the evidence that his failure to register was not knowing or willful. Appellant's appeal of his termination as a result of his ineligibility for appointment under 5 U.S.C. § 3328 is not within the jurisdiction of the MSPB. The Board's jurisdiction is not plenary it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board,* 759 F.2d 9, 10 (Fed.Cir.1985). However, even in situations where it might appear that the Board has been given jurisdiction over a particular matter by law, rule, or regulation, an exception might exist that would preclude the Board from exercising jurisdiction over the matter. *See, e.g., Toda v. Merit Systems Protection Board,* 55 F.3d 1574, 1577-78 (Fed.Cir.1995) (the

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appeal was timely filed need not be addressed.

[*] [The document filed in the district court included the following handwritten note in the margin: No. I said challenging willful decision.]

Board properly dismissed an appeal for lack of jurisdiction where the employee was hired under a specific statutory authority that allowed the agency to employ particular personnel without the protections provided by 5 U.S.C. §§ 7511, 7512, and 7701). For example, the Board generally finds that an individual who shows that he was otherwise entitled to adverse action procedures does not lose that protection merely because the agency's action was based on an unlawful appointment, but the Board has recognized an exception to this rule where the appointment was made in violation of an absolute statutory prohibition so that the appointee was not qualified for appointment in the civil service. *See Lovoy v. DHHS*, 94 MSPR 571, 586 (2003) *citing Travaglini v. Department of Education*, 23 MSPR 417, 419 (1984). Thus, Appellant does not enjoy status as an employee because his appointment was unlawful and in violation of an absolute statutory prohibition.[*]

Appellant's appointment was in violation of 5 U.S.C. § 3328, which is an absolute statutory prohibition to his appointment[2]. Section 3328 (a) provides the following:

> An individual—
>
> (1) who was born after December 31, 1959,

---

[*] [Highlighting included in the document filed in the district court.]

[2] The Agency is not suggesting that Appellant committed fraud, or misrepresented or concealed a matter material to his appointment. As indicated above, Appellant properly certified at his second background investigation that he had not registered with the selective service prior to his appointment. However, the Agency did not realize, prior to his appointment, that he was not registered with the selective service, and thus, was ineligible for appointment to a position with the Agency.

> and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C. App. 453) ; and
>
> (2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual,
>
> shall be ineligible for appointment to a position in an Executive agency.

5 U.S.C. § 3328.

It is undisputed that Appellant was required to be registered with the Selective Service; that Appellant failed to register; and that 5 U.S.C. § 3328 absolutely prohibits his appointment to a position with the Agency where OPM has determined that his failure to register was knowing and willful. While OPM was authorized by 5 U.S.C. § 3328 to prescribe regulations to carry out this section, the regulations only include the procedures for adjudicating whether failure to register was knowing and willful.[3] 5 U.S.C. § 3328 (b).

Pursuant to the statute and the regulations, the Agency has no authority to adjudicate the issue of whether Appellant's failure to register was knowing and willful. That authority rests solely with OPM. 5 C.F.R. § 300.706(a) (OPM will determine whether failure to register was knowing and willful . . . ."). *See also* 5 CFR § 300.706 (b) ("The determination is final unless reconsidered at the discretion of the associate Director. There is no further right to administrative review."). Thus, once OPM determined that

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[3] The Agency complied with the adjudication procedures prescribed by OPM. AF 4D.

Appellant's failure to register for the Selective Service was knowing and willful, the Agency lacked any discretion to override OPM and appoint an individual who has failed to register, not even to promote the efficiency of the service or for temporary appointments. In this regard, even Appellant's lengthy service is unavailing. 5 U.S.C. § 3328. *See also,* 5 C.F.R. §§ 300.705(e), 300.706, 300.707. As such, the statutory prohibition is absolute, and Appellant's appointment violated the prohibition. The Board is thus precluded from exercising jurisdiction over this matter. See generally, 5 CFR ¶1201.3. *See Lovoy* at 586; *C.f., Clarke v. OPM,* 2007 WL 2363295 (SD Tex.) (August 17, 2007).

Appellant's challenging of the constitutionality of 5 USC §3328 is also not within the scope of the Board's jurisdiction. *See generally,* 5 CFR §1201.3. Moreover, the constitutionality of the Military Selective Service Act (MSSA) has been upheld by the Supreme Court of the United States holding that Congress acted within its constitutional authority when it authorized registration of men, and not women under the MSSA. *See Rostker v. Goldberg,* 453 US 57 (1981). Accordingly, Appellant has failed to establish that this matter is within the scope of the Board's jurisdiction.

II. CONCLUSION

Based on the foregoing, the Agency respectfully requests the Administrative Judge dismiss this appeal for lack of jurisdiction. The Agency denies each and every allegation of Appellant's appeal, including any affirmative defenses, not specifically admitted herein or in the remainder of the Agency File. In addition, the

Agency respectfully reserves the right to submit further evidence and argument in support of its case.

Respectfully Submitted,

ELLIOT M. CARLIN
Area Counsel
General Legal Services, Manhattan

By: [/s/]

Bonnie Edwards
Agency Representative

ndard Form 50
7/91
. Office of Personnel Management
M Supp. 296-33, Subch.4

NOTIFICATION OF PERSONNEL ACTION

1. Name (Last, First, Middle)	2. Social Security Number	3. Date of Birth	4. Effective Date
AGIN, MICHAEL B	[redacted]	[redacted]	07-27-2007

FIRST ACTION		SECOND ACTION	
A. Code	5-B. Nature of Action	6-A. Code	6-B. Nature of Action
7	TERMINATION		
C. Code	5-D. Legal Authority	6-C. Code	6-D. Legal Authority
AM	5 USC 3328		
E. Code	5-F. Legal Authority	6-E. Code	6-F. Legal Authority

14. FROM: Position Title and Number	15. TO: Position Title and Number
FOR TECHNOLOGY SPC (CUSTOMER S DAY 047260 94392A	

ay	9. Occ. Code	10. Grade or Level	11. Step or Rate	12. Total Salary	13. Pay Basis	16. Pay Plan	17. Occ. Code	18. Grade or Level	19. Step or Rate	20. Total Salary/Award	21. Pay Basis
5	2210	11	05	$65,483.00	PA					00	

A. Basic Pay	12B. Locality Adj.	12C. Adj. Basic Pay	12D. Other Pay	20A. Basic Pay	20B. Locality Adj.	20C. Adj. Basic Pay	20D. Other Pay
3,238.00	$12,245.00	$65,483.00	.00	.00	.00	.00	.00

14. Name and Location of Position's Organization	22. Name and Location of Position's Organization
TERNAL REVENUE SERVICE DRN, INFO TECH SERVICES ND USERS EQUIPMENT & SERVICES OPERATIONS : 933521211303030300 PP 15 2007	

MPLOYEE DATA

Veterans Preference	24. Tenure	25. Agency Use	26. Veteran's Preference for RIF
1-None 3-10 Point/Disability 5-10 Point/Other 2-5 Point 4-10 Point/Compensable 6-10 Point/Compensable/30%	1 (0-None 2-Conditional 1-Permanent 3-Indefinite)		YES / X / NO

FEGLI	28. Annuitant Indicator	29. Pay Rate Determinant
1 BASIC	9 NOT APPLICABLE	6

Retirement Plan	31. Service Comp. Date (Leave)	32. Work Schedule		33. Part Time Hours Per Biweekly Pay Period
FERS AND FICA	02-11-1991	F	FULL TIME	Pay Period

OSITION DATA

Position Occupied	35. FLSA Category	36. Appropriation Code	37. Bargaining Unit Status
1-Competitive Service 3-SES General 2-Excepted Service 4-SES Career Reserved	N (E-Exempt N-Nonexempt)		0337

Duty Station Code	39. Duty Station (City-County-State or Overseas Location)
-0120-025	BOSTON SUFFOLK MA

Agency Data	41.	42.	43.	44.

Remarks

EASON(S) FOR TERMINATION:ILLEGAL APPOINTMENT-FAILURE TO REGISTER

45. Employing Department or Agency	50. Signature/Authentication and Title of Approving Official
EPARTMENT OF THE TREASURY	MICHELE H. NELSON AD, IRS PAYROLL CENTERS

Agency Code	48. Personnel Office ID	49. Approval Date
93	2875	07-27-2007

Editions Prior to 7/91 Are Not Usable After 6/30/93

1-Employee Copy- Keep for Future Reference

NSN 7540-01-333-6236

41

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 07-12391-DPW
(Filed June 3, 2009)

MICHAEL B. ELGIN, AARON LAWSON, HENRYTUCKER and CHRISTON COLBY on behalf of themselves and similarly situated men throughout the United States

Plaintiffs,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE TREASURY; and UNITED STATES DEPARTMENT OF THE INTERIOR

Defendants.

DEFENDANTS' REPORT TO THE COURT

During the May 20, 2009 motions hearing in this matter, the Court requested that Defendants "report to the Court on the existence and availability of any guidelines that OPM uses to determine whether an employee's failure to register with the Selective Service was 'knowing' or 'willful.'" This report is in response to the Court's oral order.

With regard to those Federal employees who fall under Title 5, OPM relies on the following legal authorities: (a) 5 U.S.C. § 3328; (b) 50 U.S.C. App. 453; (c) Proclamation No. 4771, reprinted in 50 U.S.C. App. § 465, 45 Fed. Reg. 45,247 (July 2, 1980), as amended by Proclamation No. 7275, 65 Fed. Reg. 9,199 (Feb. 22, 2000); and (d) 5 C.F.R. § 300 Subpart G. In addition, OPM has non-public written materials that pertain to its determinations whether an employee's failure to register with the Selective Service was "knowing or willful." These non-public materials include memoranda protected by the attorney client privilege, attorney work product, and/or deliberative process privilege. OPM also has non-public internal correspondence that may be protected, in whole or in part, by one of the above-mentioned privileges. To the extent any of these documents, in whole or in part, are non-privileged, they will be made available in response to proper discovery requests[1] or at the Court's request.

Respectfully submitted,

MICHAEL K. LOUCKS
Acting United States Attorney

By: /s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant United States Attorney

---

[1] It is Defendants' understanding that the parties have reached an agreement to hold any further discovery in abeyance pending this Court's resolution of the various motions currentlyunder advisement.

United States Attorney's Office
One Courthouse Way, Suite 9200
Boston, MA 02210
Tel: (617) 748-3188
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Dated: June 3, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and paper copies will be sent to those indicated as non-registered participants on June 3, 2009.

/s/ Jennifer A. Serafyn
Jennifer A. Serafyn
Assistant U.S. Attorney

UNITED STATES OFFICE OF PERSONNEL MANAGEMENT
Washington, DC 20415

Office of the
General Counsel

OCT 2 2009
(Filed in Dist. Ct. Oct. 16, 2009)

Mr. [redacted]

Dear Mr. [redacted]

This letter responds to your request to reopen and reconsider the U.S. Office of Personnel Management's determination that your failure to register with the Selective Service was knowing and willful. No ruling has yet been issued on your request. We are writing now to advise you that you have an opportunity to submit additional documentation in support of your request.

Under the Military Selective Service Act of 1948, all males who have attained 18 years of age, and were born after December 31, 1959, are required to register with the Selective Service System, unless exempted under Sections 3 or 6(a) of the Act. 50a U.S.C. § 453. Individuals for whom registration is required, but who fail to register before their 27th birthday, are barred from federal employment, unless they can establish by a preponderance of the evidence that their failure to

register was not knowing and willful. See 5 U.S.C. § 3328. By operation of law, individuals are presumed to have notice of the registration requirements. See Military Selective Service Act, 50a U.S.C. §465; Presidential Proclamation No. 4771 (July 2, 1980, amended 2000).

In considering whether this presumption of notice can be overcome, the Director of OPM considers all information provided by an applicant under the preponderance of the evidence standard and makes a determination based on the record as a whole. Federal regulations define the preponderance of the evidence standard as "the degree of relevant evidence that a reasonable person considering the record as a whole, would accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R §300.703.

When making a reconsideration decision, the Director assesses the person's written explanation and other documentation provided. The Director gives greater weight to statements provided under oath or penalty of perjury. Similarly, the Director gives greater weight to statements corroborated by credible documents.. A representative of the Director may wish to ask you questions about your explanation. Your willingness to respond to questions will be taken into consideration, as will the record of that discussion and your demeanor during the discussion.

Before we process your request, you may wish to supplement it with a sworn statement (that is, an affidavit or a written declaration under penalty of

perjury) that explains why you failed to register with Selective Service. This declaration must be signed by you and should contain language that states that you are signing it under oath or penalty of perjury. You may also wish to provide any relevant documentation that supports your explanation for why you failed to register with the Selective Service System or provides other evidence you believe is relevant. You are also free to provide statements or sworn statements from other persons with first-hand knowledge of relevant facts.

Under 18 U.S.C. §1001, persons making materially false statements or representations, using a false writing or document, or concealing or falsifying a material fact in any matter before the executive branch are subject to criminal penalties by fine and/or imprisonment. Sworn statements, documentation, and any other relevant materials should be submitted to the Office of General Counsel, U.S. Office of Personnel Management, 1900 E Street, NW, Washington DC 20415. When submitting any additional materials, please provide contact information in the event a representative from the Office of the General Counsel wishes to ask you questions about your submission.

If you have not yet submitted a Status Information Letter from the Selective Service System, you should request one immediately and submit it with your materials. You can obtain a Status Information Letter request form at http://www.sss.gov/instructions.html

Should you have any questions regarding the aforementioned matters, you may contact the Office of the General Counsel at OPM at (202) 606-1700.

Sincerely,

[/s/]
Elaine Kaplan
General Counsel

PETITIONER'S BRIEF

RECORD
AND

OFFICE OF THE CLERK

No. 11-45

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,
Petitioners.

v.

DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' BRIEF

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Counsel for Petitioners

December 2011

QUESTION PRESENTED

Do federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees, or does the Civil Service Reform Act impliedly preclude that jurisdiction?

PARTIES

Petitioners:
Michael B. Elgin
Aaron Lawson
Henry Tucker
Christon Colby

Respondents:
United States of America
U.S. Department of the Treasury
U.S. Department of the Interior

Petitioners initially also sought equitable relief against the President of the United States and the individual heads of Respondent federal agencies in their official capacities. The district court granted Petitioners' motion to dismiss their claims against the individual defendants, and those defendants are no longer parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a) is published at 641 F.3d 6. The district court's decision granting Respondents' motion for reconsideration (Pet. App. 39a) is published at 697 F. Supp. 2d 187. The district court's decision granting Petitioners' motion for partial summary judgment and denying in part and granting in part Respondents' motion to dismiss (Pet. App. 65a) is published at 594 F. Supp. 2d 133.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. Pet. App. 2a. The Petition for a Writ of Certiorari was filed on July 7, 2011, and was granted on October 17, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 3328 bars men who fail to register with the Selective Service from federal Executive agency employment. It provides:

> (a) An individual—
>
> (1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C. App. 453); and
>
> (2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual, shall be ineligible for appointment to a position in an Executive agency.

> (b) The Office of Personnel Management, in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. Such regulations shall include provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful. Such procedures shall require that such a determination may not be made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful. Such procedures may provide that determinations of eligibility under the requirements of this section shall be adjudicated by the Executive agency making the appointment for which the eligibility is determined.

50 U.S.C. app. § 453, which requires men to register with the Selective Service, is reproduced in the appendix to this brief at 1a.

The Civil Service Reform Act of 1978 outlines administrative procedures available to certain federal employees for certain adverse employment actions. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.). Relevant portions of the Civil Service Reform Act are reproduced at Pet. App. 108a.

STATEMENT OF THE CASE

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are former federal employees. Joint Appendix (JA) 3. Each was

terminated or constructively terminated from his federal employment under 5 U.S.C. § 3328, which imposes a lifetime bar to federal Executive agency employment on men who do not register with the Selective Service between the ages of 18 and 26. JA 3-5. Petitioners brought this action in district court against their former employers, Respondents United States, U.S. Department of the Treasury, and U.S. Department of the Interior. JA 6-8. Petitioners challenged 5 U.S.C. § 3328 as a bill of attainder and, along with 50 U.S.C. app. § 453, as violative of their constitutional rights to equal protection on the basis of sex, seeking injunctive and declaratory relief. JA 5. The district court rejected Respondents' assertion that it lacked jurisdiction to review Petitioners' claims because the Civil Service Reform Act (CSRA), 92 Stat. 1111, impliedly precludes federal district courts from granting equitable relief for constitutional injuries. Pet. App. 49a-51a. However, after initially allowing Petitioners' motion for summary judgment on the bill of attainder claim, *id.* at 66a-67a, the district court ultimately rejected both of Petitioners' claims on their merits. *Id.* at 39a-40a.

A divided panel of the Court of Appeals for the First Circuit agreed with the Government that the CSRA impliedly precludes jurisdiction over Petitioners' claims. *Id.* at 6a-7a. Accordingly, it vacated the district court's decision and remanded for entry of a new judgment denying Petitioners relief for lack of subject matter jurisdiction, *id.* at 15a.

To understand why the First Circuit erred, it is necessary to first describe, in Part A below, the

provision of the Military Selective Service Act that Petitioners challenge, the CSRA, and the Merit Systems Protection Board (MSPB)—the administrative adjudicator to which the Government maintains Petitioners were required to present their claims even though it lacked authority to resolve them. Part B explains how the bar to government employment for men who do not register with the Selective Service affected Petitioners. Finally, Parts C and D discuss the proceedings below.

A. Statutory and Regulatory Background

1. The Military Selective Service Act requires all men between the ages of 18 and 26 to register with the Selective Service upon proclamation of the President. 50 U.S.C. app. § 453(a). Since 1980, a presidential proclamation has required registration, and all persons are, by statute, "deemed" to know about the registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980); 50 U.S.C. app. § 465(a). Failure to register is a crime, punishable by a fine of up to $10,000 and up to five years in prison. *Id.* § 462(a). Men can be prosecuted until their 31st birthdays. *Id.* § 462(d). In 1985, Congress enacted 5 U.S.C. § 3328, which further penalizes men who knowingly and willfully fail to register by imposing a lifetime bar to federal Executive agency employment. Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Regulations provide for the termination of employees who fail to register. 5 C.F.R. § 300.707. The Office of Personnel Management (OPM) is responsible for determining whether the failure to register was knowing and willful. *Id.* Though an employee may appeal the

initial determination within OPM. OPM's ultimate determination is final and is not subject to further administrative review. 5 C.F.R. § 300.706(c).[1]

2.a. The CSRA was intended to streamline the process by which managers in federal agencies hire, remove, and discipline their employees. *See* 92 Stat. 1111. When the CSRA was enacted in 1978, the civil service system had not been comprehensively overhauled since passage of the Pendleton Act in 1883. H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 How. L.J. 283, 297 (1986). The Pendleton Act was concerned primarily with eliminating the politically motivated, merit-blind hiring that prevailed in the late 1800s. Pendleton Act of 1883, ch. 27, § 7, 22 Stat. 403, 406 (1883). It created the Civil Service Commission (CSC) to oversee merit-based examinations for federal employment. 124 Cong. Rec. 27,544 (daily ed. Aug. 24, 1978) (statement of Sen. Stevens). The Pendleton Act, however, was silent regarding the discipline, demotion, and removal of employees. As a result, politically motivated and arbitrary removals of federal employees remained unregulated. *See* Egon Guttman, *The Development and Exercise of*

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[1] On November 29, 2011, OPM proposed regulations that would revise 5 C.F.R. §§ 300.701-.707. Statutory Bar to Appointment of Persons Who Fail To Register Under Selective Service Law, 76 Fed. Reg. 73521 (proposed Nov. 29, 2011). The proposed changes would not affect the procedure outlined here, except that the employing agency, rather than OPM, would make the initial knowing and willful determination. *Id.* at 73522-23, 73525.

Appellate Powers In Adverse Action Appeals, 19 Am. U. L. Rev. 323, 324 (1970).

By the 1970s, a patchwork of statutes and executive orders regulated the removal and discipline of federal employees. S. Rep. No. 95-969, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2725. First, the Lloyd-LaFollette Act established a just-cause requirement for adverse actions against federal employees, requiring that the employee be given reasons in writing and an opportunity to respond, but providing no clear way to enforce those rights beyond the employing agency. *See* Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555. Second, the Veterans' Preference Act authorized veterans to appeal adverse actions to the CSC and the CSC to order agencies to comply with its decisions, but did not clarify how employee rights could be enforced in court. Veterans' Preference Act of 1944, Pub. L. No. 78-359, ch. 287, 58 Stat. 390. Finally, in 1962, Executive Orders 10,987 and 10,988 extended the Veterans' Preference Act's CSC appeal provisions to cover non-veteran employees and required individual agencies to also process employee appeals. 27 Fed. Reg. 550 (Jan. 17, 1962); 27 Fed. Reg. 551 (Jan. 17, 1962). During this period, the CSC created a Board of Appeals and Review to handle appeals from its initial decisions. Guttman, 19 Am. U. L. Rev. at 332-33.

The result was a process "so lengthy and complicated that managers often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S. Rep. No. 95-969, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 2731-32. A federal

employee could appeal to the employing agency and/or pursue two stages of CSC review. Case, 29 How. L.J. at 293. No pre-CSRA employment statute clearly provided a basis for or scope of court review of an agency action, but employees brought claims challenging the adverse employment actions in district court or damages claims in the Court of Claims under a wide variety of theories whether or not the employee exhausted administrative review. *See United States v. Fausto*, 484 U.S. 439, 444-45 (1988). District courts "uniformly concluded" that they had jurisdiction over these claims, but could not agree on why. *See* Richard C. Johnson, Richard G. Stoll, *Judicial Review of Federal Employee Dismissal and Other Adverse Actions*, 57 Cornell L. Rev. 178, 180 (1971-1972). Like any other district court case, employees' claims were then subject to federal appellate review.

Moreover, the CSC had developed two potentially contradictory roles: It retained its function as the "provider of services to agency management" in employee evaluation and hiring, but now had to "maintain[] sufficient neutrality to adjudicate disputes between agency managers and their employees." S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727. These "role conflicts" led the CSC to become "progressively less credible in all of its roles." *Id.*

b. Congress enacted the CSRA to streamline the review of adverse employment actions by agency managers. *See* 92 Stat. 1111. It abolished the CSC and divided the CSC's managerial and adjudicatory functions between two agencies. *Id.* The CSRA

created OPM to regulate the merit-based hiring and management of employees. *Id.* § 201. It endowed the MSPB, an expert adjudicatory agency, with the power to review claims by employees appealing adverse actions by agency managers. *See* 5 U.S.C. § 7701. The MSPB's mission is "to ensure that Federal employees are protected against abuses by agency management, that executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices." U.S. Merit Sys. Prot. Bd., *An Introduction to the Merit Systems Protection Board* 5 (1999). The MSPB is empowered to hear employee appeals regarding adverse employment actions and to order any federal agency or employee to comply with its order. 5 U.S.C. § 1204(a)(1)-(2). The MSPB may evaluate certain rules and regulations issued by OPM. 5 U.S.C. § 1204(a)(4).

In evaluating personnel actions, the MSPB uses a series of "merit system principles" and "prohibited personnel actions"—all of which concern the manager-employee relationship. *See* 5 U.S.C. §§ 2301, 2302. The "merit system principles" provide for open, merit-based hiring; fair and equitable treatment of employees; equal pay for work of equal value; high standards of integrity for employees; efficient and effective use of the federal work force; retention of employees based on the adequacy of their performance; protection of employees "against arbitrary action, personal favoritism, or coercion for partisan political purposes"; and prohibition of retaliation for whistleblowing. 5 U.S.C. § 2301(b)(1)-

(8). The "prohibited personnel practices," too, regulate the manager-employee relationship, providing that employees in supervisory positions may not discriminate on the basis of race, age, sex, disability, or marital status; consider employees for hire or promotion on the basis of non-merit recommendations; coerce the political activity of employees; obstruct the open competition for employment; evaluate employees or applicants on any basis not approved by law; hire or promote a relative; retaliate for exercising any protected right; violate the veterans' preference; or take any action that would violate any law, rule, regulation, or the merit principles. 5 U.S.C. § 2302(b)(1)-(12).

The MSPB has jurisdiction to adjudicate manager-employee disputes. The MSPB has original jurisdiction over actions brought by its Office of Special Counsel charging agency managers with engaging in prohibited personnel practices. 5 U.S.C. §§ 1214-1216; 5 C.F.R. § 1201.2(a). It also has jurisdiction to hear appeals by employees of a range of actions taken by agency managers, including actions for unacceptable job performance under 5 U.S.C. § 4303(e); adverse actions "for cause that will promote the efficiency of the service" under 5 U.S.C. §§ 7511-7514; reduction-in-force actions; determinations affecting retirees; failure to re-employ former employees after their detail to other agencies; suitability disqualifications of employees or applicants; and employee terminations within the probationary period when the employee alleges partisan political discrimination. 5 C.F.R. § 1201.3.

Although the MSPB may review a wide range of

actions by agency managers, as an agency, the MSPB may not review the facial constitutionality of a federal statute underlying an agency action. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). As a result, the MSPB has held, and the Government has acknowledged, that when an employee challenges a statute's constitutionality, the MSPB does not have authority to hear the case on its merits. Pet. App. 101a; Cert. Opp. 10-11.

c. The CSRA provides that an "employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision" in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(a)(1), (b). The Federal Circuit is then instructed to "review the record and hold unlawful and set aside any agency action, findings, or conclusions" that it finds "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1), (3).

Congress created direct appellate review of MSPB decisions under a generally deferential standard with the intent to "eliminate[] an unnecessary layer of judicial review" that had existed prior to the CSRA, and "avoid[] burdening the courts with unnecessarily detailed review of agency actions by establishing as the scope of review the traditionally limited appellate review the courts provide agency actions in other areas." S. Rep. No. 95-969, at 49; *reprinted in* 1978 U.S.C.C.A.N. at 2774.

B. Factual Background

The Selective Service System has no record of registration for any of the Petitioners. Three of them—Elgin, Tucker, and Colby—became aware of the registration requirement only after their 26th birthdays, when it was too late to register. JA 13-14, 16, 17, 18. The fourth—Lawson—knew about the requirement and maintains that he registered, but the Selective Service System does not have a record of his registration. *Id.* at 16. Elgin, Lawson, and Colby sought determinations that their failure to register was not knowing and willful, but OPM denied their requests. *Id.* at 14-15, 16-17, 19, 22.

1. Michael B. Elgin was first hired in 1991 by the Internal Revenue Service (IRS), an agency of the Treasury Department. JA 14. As part of a routine background investigation when offering Elgin a promotion in 2002, the IRS learned that Elgin had not registered with the Selective Service and passed that information on to OPM. *Id.*

Elgin sought a determination from OPM that his failure to register was not knowing and willful under 5 U.S.C. § 3328. *Id.* If OPM determined that Elgin's failure to register was not knowing and willful, his employment would be permitted. 5 C.F.R. § 300.707. Elgin argued that his failure to register was not knowing and willful because he had not been aware of the registration requirement; at age 18, he was struggling to complete high school and support his son while being virtually homeless. JA 13-14. OPM, however, determined that Elgin's failure to register was knowing and willful. *Id.* at 14. With the support of both Massachusetts Senators, the IRS asked OPM

to reconsider and find that Elgin's failure to register was unintentional, explaining that Elgin was a valued IRS employee whose termination would negatively affect the agency. *Id.* at 14-15. OPM denied the IRS's request. *Id.* at 15. Elgin was terminated on July 27, 2007. *Id.*

2. Aaron Lawson has been a wildfire fighter since 1997. *Id.* at 16. He is a specialist in directing helicopter crews fighting forest fires. *Id.* In 2003, the Bureau of Land Management, a division of the Interior Department, hired him as a wildfire fighter. *Id.* Lawson later accepted a new position with the U.S. Forest Service as a wildfire fighter helicopter captain. Dist. Ct. Doc. 45-3, Affidavit of Aaron Lawson 1-2. After he was hired for the new position, the Bureau and the Forest Service learned that the Selective Service has no record of Lawson's registration. *Id.* Lawson maintains that he completed the registration forms at his local post office at the time of his 18th birthday. JA 16. The Bureau and the Forest Service requested a determination from OPM that Lawson's failure to register was not knowing and willful, a determination that would have made him eligible for employment. Dist. Ct. Doc. 45-3, at 2. OPM denied the request, and Lawson was terminated. JA 17.

3. In 2007, Henry Tucker was a Financial Institution Specialist at the Federal Deposit Insurance Corporation, where he had worked for 17 years. *Id.* He had never been aware of the requirement to register with the Selective Service; Tucker's mother left him when he was 16, and he moved frequently as a teenager. *Id.* In December

2007, the Federal Deposit Insurance Corporation learned that Tucker had not registered with the Selective Service and referred the matter to OPM. *Id.*

Fearing that he would be fired, Tucker resigned and applied for a position with the National Institutes of Health, which offered him a job as a Budget Analyst. *Id.*; Dist. Ct. Doc. 45-4, Affidavit of Henry Tucker 1. It withdrew the offer, however, after learning that Tucker had not registered with the Selective Service. JA 17-18.

4. Christon Colby began working at the IRS in 2001. *Id.* at 18. Colby received consistently excellent performance reviews and was promoted to positions with increasing responsibility. *Id.* at 19. In 2003, the IRS informed Colby that it had become aware of his failure to register with the Selective Service. *Id.* Colby sought a determination from OPM that his failure to register was not knowing and willful. Colby explained that he had moved out of his parents' home at age 18 and was unaware of the registration requirement until he was too old to register. *Id.* at 18-19.

In 2006, OPM determined that Colby's failure to register was knowing and willful. *Id.* at 19. Colby's supervisor at the IRS appealed the determination within OPM, but OPM affirmed its decision, and Colby was terminated on August 3, 2007. *Id.* at 19-22.

C. Proceedings Before the MSPB and the District Court

Shortly after being terminated under 5 U.S.C. § 3328, Petitioner Elgin appealed to the MSPB,

presenting two facial constitutional challenges: that 5 U.S.C. § 3328 is a bill of attainder and that he was subject to unconstitutional sex discrimination because the Selective Service registration requirement applies only to men. Pet. App. 101a. On November 16, 2007, at Respondent Treasury Department's urging, the MSPB dismissed Elgin's appeal for lack of jurisdiction. *Id.* at 100a-01a; *see* JA 31-32. The MSPB agreed with the Government that it lacked jurisdiction over appeals from employees terminated under absolute statutory prohibitions on employment, such as 5 U.S.C. § 3328. Pet. App. 100a-01a. The MSPB also held that it lacked authority to rule on the constitutionality of a statute. *Id.* at 101a-02a.

After Elgin's MSPB appeal was dismissed, on December 28, 2007, Elgin brought this action challenging the constitutionality of 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 in the United States District Court for the District of Massachusetts against the Treasury Department. Dist. Ct. Doc. 1, Compl. ¶ 1. Petitioner Elgin amended the complaint in February 2008 to add Lawson, Tucker, and Colby as named plaintiffs, to add the United States of America and the Department of the Interior as defendants, and to add a class action allegation. JA 3, 6-11.

In their amended complaint, Petitioners contend that 5 U.S.C. § 3328 is a bill of attainder prohibited by Article I, Section 9, Clause 3 of the Constitution because it legislatively imposes punishment—the lifetime bar to federal employment—on a specific group of men for their irreversible failure to register.

JA 26-27. Petitioners also contended that because 50 U.S.C. app. § 453 and 5 U.S.C. § 3328 apply to men only, both statutes unlawfully discriminate under the equal protection component of the Fifth Amendment. JA 28. Petitioners sought declaratory and injunctive relief, including reinstatement. *Id.* at 29-30. The claims were brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, and jurisdiction was premised on 28 U.S.C. §§ 1331, 1343, and 1346. JA 6.

The Government moved to dismiss, arguing that Petitioners' claims failed on the merits. Pet. App. 66a. The Government did not, at that time, contest the district court's jurisdiction. Petitioners responded by opposing the motion to dismiss as to the equal protection claim, arguing that discovery and the development of a factual record about the role of women in the military should be permitted. Dist. Ct. Doc. 12, Pls.' Opp. to Mot. to Dismiss 2-4, 8-11. Petitioners also sought partial summary judgment as to liability on the bill of attainder claim. Dist. Ct. Doc. 13. The district court granted Petitioners' motion for partial summary judgment, holding that 5 U.S.C. § 3328 was a bill of attainder, and granted the Government's motion to dismiss in part, holding that the Selective Service scheme did not violate Petitioners' rights to equal protection. Pet. App. 66a-67a.

Petitioners then sought a preliminary injunction reinstating Petitioners and filed a motion for class certification. Dist. Ct. Doc. 45; Dist. Ct. Doc. 57. The Government filed a motion for reconsideration of the

district court's grant of summary judgment on the bill of attainder claim, contending that the claim failed on the merits and arguing for the first time that the district court did not have subject matter jurisdiction over any of Petitioners' claims because the CSRA precludes district court review of federal employment decisions. Pet. App. 41a-42a. The district court held that it did have jurisdiction, but granted the motion for reconsideration because it determined, on reexamination, that 5 U.S.C. § 3328 was not a bill of attainder. *Id.* at 51a, 63a-64a.

D. The First Circuit's Decision

The First Circuit agreed that Petitioners' claims should be dismissed, but was divided on whether the district court had jurisdiction over Petitioners' constitutional claims for equitable relief. *Id.* at 14a-15a. The majority agreed with the Government that the CSRA provides the exclusive remedy for the termination or constructive termination of federal employees, even for facial constitutional challenges like this one. *Id.* at 5a, 14a-15a. As explained in Part A above, the CSRA permits certain federal employees to appeal their terminations to the MSPB and, eventually, to the Federal Circuit, if they were removed for, among other things, "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a); *see id.* §§ 7511-7514. The majority held that Petitioners' terminations, even though they were based solely on failure to register under 5 U.S.C. § 3328, were nonetheless terminations made for "efficiency of the service" under 5 U.S.C. § 7513(a) and thus subject to the CSRA's review procedures. Pet. App. 7a-9a; *see* JA 41.

The majority recognized that there would be a serious concern if the CSRA precluded all judicial remedies for Petitioners' constitutional claims. Pet. App. 13a. Though the majority did not dispute that the MSPB was powerless to strike down a statute as unconstitutional, it reasoned that the Federal Circuit had the authority to do so on appeal from the MSPB. *Id.* at 13a-14a. Therefore, according to the majority, the merits of Petitioners' constitutional claims could be decided at the Federal Circuit, if not the MSPB.

Petitioners had argued that their constitutional claims could not have been heard in the Federal Circuit because the Federal Circuit has itself repeatedly stated that its jurisdiction on appeal from the MSPB is coextensive with the jurisdiction of the MSPB, which would not have had jurisdiction over Petitioners' claims. *Id.* at 7a-8a, 14a. The majority disagreed, reasoning that the Federal Circuit had never addressed the question under these precise circumstances and had posited that *Webster v. Doe*, 486 U.S. 592 (1988), would require it to entertain constitutional claims seeking equitable relief. Pet. App. 14a (citing *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995); *Brockmann v. Dep't of Air Force*, 27 F.3d 544, 546-47 (Fed. Cir. 1994)). Even if the Federal Circuit would have held that it lacked jurisdiction to review Petitioners' constitutional claims, the majority explained, Petitioners could still have sought adjudication of their claims on certiorari in this Court. Pet. App. 14a.

Judge Stahl disagreed with the majority that Petitioners' constitutional claims could have been

addressed in the Federal Circuit, but would have dismissed the claims on the merits. *Id.* at 15a. He explained that the Federal Circuit's jurisdiction over appeals from the MSPB has never exceeded the scope of the MSPB's jurisdiction, even when the appellant asserted constitutional claims beyond the MSPB's jurisdiction. *Id.* at 20a-22a (citing *Hubbard v. Merit Sys. Prot. Bd.*, 319 Fed. App'x 912 (Fed. Cir. 2009) (unpublished)). Judge Stahl noted that in *Brockmann v. Department of the Air Force*, relied on by the majority, the Federal Circuit hypothesized about the possibility of reviewing constitutional claims but did not actually state that it would or could do so. *Id.* at 21a-22a (discussing *Brockmann*, 27 F.3d at 546-47). Therefore, Judge Stahl reasoned, the better reading of the Federal Circuit's decisions was that it would not have had jurisdiction, and the CSRA process would not have provided any review of Petitioners' constitutional claims. *Id.* at 22a.

SUMMARY OF THE ARGUMENT

I. District courts have jurisdiction over and authority to provide an equitable remedy for federal employees' constitutional injuries. The federal courts have always had authority to consider claims to enjoin unconstitutional conduct by government officials, and 28 U.S.C. § 1331 puts those constitutional claims within the jurisdiction of the federal district courts. Here, Petitioners claim that 5 U.S.C. § 3328 and 5 U.S.C. app. § 453 are unconstitutional, and they seek to enjoin the enforcement of those statutes. Petitioners' claims present exactly the types of issues that Congress intended federal district courts to adjudicate.

Without explicit direction from Congress, courts may not assume that Congress removed district courts' authority to grant equitable relief for constitutional claims. *Webster v. Doe*, 486 U.S. 592, 603 (1988). It is undisputed that Congress did not address constitutional claims in the CSRA, and the CSRA's comprehensive statutory scheme for resolving day-to-day federal employment disputes is not sufficient to indicate that Congress intended to remove the district court's authority to resolve constitutional claims for equitable relief. Because the CSRA does not expressly remove that authority, district courts retain their authority to determine equitable constitutional claims whether or not the MSPB also has jurisdiction and authority to resolve the employee's claim. For this reason alone, the First Circuit's decision should be reversed.

II. Even if the CSRA impliedly removes the district court's authority to adjudicate some or all as-applied constitutional claims for equitable relief that the MSPB would hear on the merits, district courts still have the authority to resolve Petitioners' claims. Congress did not impliedly eliminate the district court's authority to grant relief on equitable constitutional claims like Petitioners' that challenge the statutes under which they were terminated and seek a declaration that the statutes are facially unconstitutional.

The CSRA's structure and history indicate that MSPB review was not designed to deal with collateral challenges to statutes. The MSPB was designed to adjudicate management-employee disputes. It is undisputed that the MSPB does not

have the authority to declare an Act of Congress unconstitutional. For that reason, Congress could not have intended, without saying so, that claims like Petitioners' should go to an administrative forum that cannot adjudicate them instead of one that can—the district court.

That the CSRA provides for on-the-record appellate review of ordinary MSPB decisions in the Federal Circuit does not indicate, as the Government maintains, that Congress intended that constitutional claims like Petitioners' would be heard for the first time on appeal in the Federal Circuit. To the contrary, Congress could not have desired such an anomalous form of appellate review for constitutional claims because, like other appellate courts, the Federal Circuit cannot create the record needed to resolve claims that were not heard on their merits by the tribunal below.

ARGUMENT

I. The Federal District Courts Are Authorized to Award Equitable Relief for Federal Employees' Constitutional Claims.

Federal district courts have original jurisdiction over constitutional claims and, furthermore, district courts can grant equitable relief for constitutional violations. Because the CSRA does not remove district courts' authority to decide equitable constitutional claims, district courts have that authority with respect to all equitable constitutional claims brought by federal employees.

A. Federal District Courts Have Jurisdiction Over Constitutional Claims.

Federal district courts are best situated to hear constitutional claims for equitable relief. District courts have the ability to develop the record and make factual determinations that other tribunals, including appellate courts, do not. *See England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 416-17 (1964). Congress conferred federal question jurisdiction on the district courts in the Jurisdiction and Removal Act of 1875, the direct precursor to 28 U.S.C. § 1331. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. Under § 1331, the district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Because Petitioners' bill of attainder and equal protection claims arise under the Constitution, the district court has original jurisdiction over them.

This Court has consistently held that § 1331 grants jurisdiction over colorable constitutional claims to the federal district courts. In *Bell v. Hood*, 327 U.S. 678, 681 (1946), for example, the Court held that the district court had jurisdiction over the plaintiff's colorable claim that a federal officer was liable to him for a constitutional wrong whether or not the plaintiff had actually stated a valid cause of action. The Court explained that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* at 684. In a case involving the CSRA, this Court similarly noted the breadth of the jurisdiction conferred by the "very familiar" § 1331, and indicated that § 1331 would

confer jurisdiction over a federal employee's constitutional claims unless it could be shown that the CSRA affirmatively divested the district court of jurisdiction over such claims. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513-14 (2006) (per curiam). Thus, because Petitioners have pled colorable constitutional claims, § 1331 places their claims squarely within the jurisdiction of the district court.

B. Federal Courts Have the Power to Grant Relief for Equitable Constitutional Claims.

It is well established that federal courts have the authority to enjoin unconstitutional actions by the government—that is, there exists a right of action for equitable relief that arises directly under the Constitution. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). From the founding of the country, the judiciary has been "in a peculiar manner the guardian of those rights." *See* Statement of James Madison, 1 Annals of Cong. 457 (1789) (presenting the Bill of Rights to Congress). This tradition is rooted in the language of the Constitution itself, which states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." U.S. Const. art. III, § 2, cl. 1.

Federal court review of such matters is integral to the vitality of the Constitution. *See Davis v. Passman*, 442 U.S. 228, 242 (1979). Unless the rights

secured by the Constitution are to become "merely precatory," individuals whose constitutional rights have been violated must be able to invoke the power of the federal courts to enforce those rights. *Id.* at 242.

This Court has never questioned the authority of the federal courts to hear and decide equitable constitutional claims. In *Osborn v. Bank of the United States*, for example, the Court entertained a challenge to a state tax levied against the Bank. 22 U.S. (9 Wheat.) 738 (1824). Although there existed no statute granting the Bank the right to challenge the state tax as unconstitutional, once this Court determined that the state tax intruded on Congress's Article I power to constitute the Bank, it could find "no plausible reason" why it should not award an injunction to restrain the state from collecting the tax. *Id.* at 844. In *Ex Parte Young*, the Court affirmed the proposition that the Constitution, coupled with federal question jurisdiction, was sufficient to permit a federal district court to provide an equitable remedy for a constitutional injury. 209 U.S. 123, 145 (1908); *see* Hart and Weschler's *The Federal Courts and the Federal System* 891 (6th ed. 2009) ("Young has long been regarded as significant because it [] recognized a cause of action for injunctive relief directly under the Fourteenth Amendment . . . .").

In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Court found that segregation in the District of Columbia public school system violated the plaintiffs' Fifth Amendment right to due process. Although *Bolling* did not elaborate on why the plaintiffs were

able to obtain a judicial remedy, it seems clear that a cause of action arose directly under the Fifth Amendment.[2] This Court has continued to hear challenges to the constitutionality of federal statutes in the absence of specific statutory authority to sue. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 8 (2005); *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established."); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400-05 (1971) (Harlan, J., concurring) (discussing the "presumed availability of equitable relief" against federal officials to enforce constitutional norms); *see also Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.); *Hubbard v. U.S. Envtl. Prot. Agency*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986).

Whether a federal court will grant relief for an otherwise meritorious claim over which it has jurisdiction may depend on the type of relief requested. As the cases discussed above demonstrate, the federal courts have always been open to granting equitable relief to redress constitutional violations. Federal courts, however, have been more hesitant to recognize causes of action claiming money damages for constitutional violations. *See Carlson*, 446 U.S. at 42-43 (Rehnquist, J. dissenting). When a plaintiff

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[2] Although a court today might have relied on the statutory cause of action provided by 42 U.S.C. § 1983, that statute did not apply to officials acting under the authority of the District of Columbia when *Bolling* was decided. *See District of Columbia v. Carter*, 409 U.S. 418 (1973).

seeks monetary relief, this Court has held that such relief is unavailable when "special factors counsel[] hesitation" in awarding the remedy or when Congress has expressly foreclosed it. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 377-78 (1983)). But "[j]ust because 'special factors counselling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well." *Mitchum*, 73 F.3d at 35-36.

In *Bush v. Lucas*, this Court held that the CSRA's comprehensive remedial scheme was a "special factor counselling hesitation" against extending judicially created monetary remedies and declined to provide relief for federal employees bringing suit for money damages to redress constitutional injuries. 462 U.S. at 381, 390; *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). This Court reasoned that deciding whether a federal employee should recover damages from his supervisor for disciplinary action is a policy decision best left to Congress. *Bush*, 462 U.S. at 390. Conversely, this Court has never said that whether a federal court can enjoin unconstitutional conduct—that is, award equitable relief—is a policy choice that Congress should make. In other words, though the presence of a statutory scheme might counsel hesitation in extending a damages remedy, it is irrelevant in deciding whether an equitable remedy is available.

C. The CSRA Does Not Divest District Courts of the Ability to Review the Equitable Constitutional Claims of Federal Employees.

1. District Courts Are Divested of the Ability to Adjudicate Equitable Constitutional Claims Only Where Congress Removes That Jurisdiction Explicitly, and It Did Not Do So Here.

The adjudication of "constitutional issues is a primary responsibility of the courts." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Thus, there is a "strong presumption" favoring the availability of judicial review of constitutional questions. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986).

Accordingly, unless "a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 291 (1960) (quoting *Brown v. Swann*, 328 U.S. 497, 503 (1836)). That is, a district court will retain the ability to adjudicate constitutional claims unless Congress expressly precludes its jurisdiction. *Whitman*, 547 U.S. at 514 ("The question, then, is not whether [the statute at issue] confers jurisdiction, but whether [the statute] (or the CSRA as a whole) removes the jurisdiction given to the federal courts . . . ."). And, as this Court has explained, "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Ultimately, in light of the judiciary's role in protecting constitutional rights, the unbroken tradition of federal court enforcement of constitutional rights, and the text of 28 U.S.C. § 1331, Congress may only divest the district courts of authority to review equitable constitutional claims if it does so expressly. The Government concedes that the CSRA does not meet this "heightened standard" of preclusion, *id.* at 603, because it does not expressly bar suits in district court seeking equitable constitutional relief. Cert. Opp. 10 n.2.

To be sure, as the Government points out, Cert. Opp. 8, in *United States v. Fausto*, 484 U.S. 439 (1988), the Court held that the CSRA, which did not provide judicial review of suspensions for certain categories of federal employees, precluded those employees from bringing Back Pay Act claims under the Tucker Act in the Court of Claims. However, *Fausto* is inapposite and does not support the contention that the CSRA precludes the district court's authority to award the equitable relief sought by Petitioners here.

Fausto concerned the interaction between two statutes, the CSRA and the Back Pay Act, rather than the interaction between the CSRA and the Constitution. 484 U.S. at 443. There, an Interior Department employee sought back pay after being suspended for the misuse of a government vehicle. 484 U.S. at 442-43. After his appeal was denied by the Department, the employee brought a Tucker Act suit in the Claims Court, *see* 28 U.S.C. § 1491, under the Back Pay Act, 5 U.S.C. § 5596. *Fausto*, 484 U.S. at 443. The Federal Circuit held that although the

CSRA did not provide the plaintiff a right of appeal to the MSPB, it did not preclude the judicial review traditionally available under the Back Pay Act. *Id.* This Court was then confronted with the question whether the CSRA, by neglecting to expressly provide for a right of review for the class of employees to which the plaintiff belonged, prevented those employees from bringing suit under the Back Pay Act. *Id.* Specifically, the Court had to determine whether the CSRA altered the traditional interpretation of the Back Pay Act, which allowed for judicial review in the Court of Claims. *Id.* at 453. In deciding that it did so, thus precluding judicial review, the Court was quick to note that "[a]ll we find to have been 'repealed' by the CSRA is the judicial interpretation of the Back Pay Act—or, if you will, *the Back Pay Act's implication*—allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay." *Id.* (emphasis added).

The Court's decision in *Fausto* that Congress intended the CSRA to alter an earlier judicial interpretation of a similar statute is different in kind from the First Circuit's conclusion below that Congress intended the CSRA to preclude federal employees from seeking judicial review to vindicate their equitable rights under the Constitution. Pet. App. 6a. Congress, after all, is free to amend or repeal statutes, but it cannot amend or repeal the Constitution. *Cf. Webster*, 486 U.S. at 603 (explaining that a "'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional

claim") (internal citations omitted); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (noting that "judicial cognizance of constitutional challenges to veterans' benefit legislation" was not contrary to a statutory clause precluding judicial review of specific decisions made by the Veterans' Administration under that legislation). In addition, *Fausto* found that the CSRA precluded judicial review under the Back Pay Act only "for the type of personnel action covered by that chapter [of the CSRA]." *Fausto*, 484 U.S. at 448. By contrast, here, as explained below in Part II.A.2, Petitioners' facial constitutional claims are collateral to the CSRA and have nothing to do with the types of day-to-day personnel actions adjudicated by the MSPB.

2. The Presence of a Comprehensive Statutory Scheme Is, Without More, Insufficient to Demonstrate That Congress Intended to Preclude District Court Review of Equitable Constitutional Claims.

The presence of a comprehensive statutory remedial scheme does not imply that Congress meant to deny federal district courts authority to review equitable constitutional claims. The existence of a comprehensive scheme matters when the plaintiff seeks money damages. In *Bush v. Lucas*, 462 U.S. 367, this Court declined to recognize a "new" judicial damages remedy under *Bivens* because the claims arose "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies." *Id.* at 368. The Court in *Bush*, therefore, faced a different question from that presented here, where

Petitioners seek only equitable relief for their constitutional injuries. Although the regulatory scheme established by the CSRA was a "special factor" counseling against the creation of a new damages remedy, this "special factor" does not weigh against the granting of equitable relief here. *See United States v. Stanley*, 483 U.S. 669, 683 (1987).

This Court's treatment of constitutional claims in the military context demonstrates that the existence of a comprehensive regulatory scheme will not preclude judicial review of equitable constitutional claims. There, Congress has established "a comprehensive internal system of justice to regulate military life," *id.* at 679 (quoting *Bush*, 462 U.S. at 302), and the Court has "long recognized two systems of justice, to some extent parallel, one for civilians and one for military personnel." *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). Nevertheless, even in the military context, where judicial deference to the political branches is at its apogee, the Court "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.* at 304; *see also Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (holding that discrimination on the basis of sex in the administration of military benefits programs violates the Due Process Clause of the Fifth Amendment). This Court, moreover, has repeatedly entertained equitable constitutional challenges to military regulations arising from district courts. *See, e.g., Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (free exercise challenge to Air Force regulation restricting the wearing of religious

headgear); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (Fifth Amendment challenge to exclusively male draft registration).

In *Johnson v. Robison*, 415 U.S. 361, this Court addressed a preclusion issue similar to the one in this case: whether district court authority to determine constitutional claims for equitable relief was precluded by a statute giving the Veterans' Administration (VA) exclusive jurisdiction over claims relating to veterans' benefits. The plaintiffs, conscientious objectors who had performed alternative civilian service, sought a declaratory judgment that the statutes denying them benefits because they did not serve in the armed forces violated their constitutional rights to equal protection and religious freedom. *Id.* at 364. The Court recognized that although the claims related to veterans' benefits in a general sense, the "questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." *Id.* at 367 (quoting *Robison v. Johnson*, 352 F. Supp. 848, 853 (D. Mass. 1973)). Thus, even though the statute provided that "the decisions of the [VA] on any question of law or fact under any law administered by the [VA] . . . shall be final and conclusive," 38 U.S.C. § 211(a) (repealed by Act of Aug. 6, 1991, P.L. 102-83, § 2(a), 105 Stat. 378 (1991)), this Court held that the preclusive effect of the statute "does not extend . . . to actions challenging the constitutionality of laws." *Johnson*, 415 U.S. at 373.

Johnson noted that § 211(a)—like the CSRA here—did not explicitly address whether

constitutional claims were barred. *Id.* It held that courts should defer in such circumstances to the agency, which, like the MSPB here, had determined that it lacked the authority to decide constitutional questions. *Id.* at 367-68. Additionally, the Court found that precluding constitutional claims was unnecessary because constitutional challenges to benefits legislation "cannot be expected to burden the courts by their volume," and do not "involve technical considerations of [agency] policy," two concerns that motivated the VA preclusion statute. *Id.* at 373.

Similarly, though Congress has, in the CSRA, established a regulatory scheme that channels review of certain personnel actions away from the district courts, the scheme should not be read to silently remove district court authority to grant equitable relief for constitutional claims. Congress is presumed to legislate with full knowledge of this Court's decisions and the rules of statutory construction employed by the courts. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). In light of this presumption, Congress should not be presumed to have intended to preclude district court review of equitable constitutional claims, thereby overturning a tradition that has existed since the founding of the Nation.

II. The Federal District Court Has Authority to Grant Equitable Relief on Petitioners' Challenges to the Constitutionality of Federal Statutes.

Petitioners contend above that all equitable constitutional claims of federal employees may be brought in district court. But even if the CSRA precludes a district court from adjudicating

constitutional claims for which the MSPB can provide relief, such as federal employees' as-applied First or Fourth Amendment claims against their managers, it does not preclude facial challenges to the constitutionality of federal statutes.

A. The Structure and History of the CSRA Demonstrate That the CSRA Does Not Preclude District Court Review of Constitutional Challenges to Federal Statutes.

1. The MSPB Was Not Designed to Adjudicate Facial Constitutional Challenges, and It Cannot Do So.

Under *Webster*, 486 U.S. at 603, court review of equitable constitutional claims cannot be precluded absent a clear statement of congressional intent to that effect. Even if, as the Government contends, *Webster*'s heightened standard does not apply, this Court has long supported "the general rule that you have to be clear when you take cases out of the Federal courts." *Mims v. Arrow Fin. Servs., LLC*, No. 10-1195, Tr. of Oral Argument 48 (argued Nov. 28, 2011) (Scalia, J.); Cert. Opp. 10 n.2. Congressional intent to preclude district court review of the type of claim at issue must be "fairly discernible in the statutory scheme" as evidenced by "the structure of the statutory scheme, its objectives, [and] its legislative history." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351, 345 (1984); *see* Cert. Opp. 10 n.2. Inferences that a court might draw from the CSRA cannot suffice; the statutory jurisdiction of the federal courts "should not be disturbed by a mere implication flowing from" Congress's handiwork. *Colo. River Water Conservation Dist. v. United*

States, 424 U.S. 800, 808 (1976) (quoting *Rosencrans v. United States*, 165 U.S. 257, 262 (1897)). Indeed, absent an explicit intent to repeal jurisdiction, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Because the CSRA is concerned with the federal manager-employee relationship, no such irreconcilable conflict exists between the CSRA and 28 U.S.C. § 1331, which grants the district court jurisdiction over constitutional claims.

Relegating Petitioners' constitutional claims to administrative review—particularly when, as here, that review cannot grant the requested relief—would be inconsistent with the CSRA's structure and purpose. The CSRA was not intended to preclude facial constitutional challenges to statutes because such challenges are outside the MSPB's purview and expertise. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) (judicial review of claims that are "wholly collateral to a statute's review provisions and outside the agency's expertise" is not precluded by that statute) (internal quotations omitted).

The MSPB seeks "to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices," U.S. Merit Sys. Prot. Bd., *An Introduction to the Merit Systems Protection Board* 5 (1999). That mission reflects its exclusive concern with regulating the federal employer-employee relationship. In assigning

to the MSPB the role of adjudicator of "disputes between agency managers and their employees," S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727, Congress could not have intended the MSPB to adjudicate facial constitutional challenges to federal statutes. A federal employee challenging the constitutional validity of the law under which he is fired is not in a dispute with his manager. That is particularly true when, as here, the statutes in question—which reflect national policy regarding Selective Service registration—have nothing to do with the terms or conditions of the workplace. Rather, the employee's dispute is with the law itself, and his claim is against the United States. *See Johnson*, 415 U.S. at 367.

The MSPB's expertise is reflected in its jurisdiction, which is generally limited to manager-employee disputes. *See* 5 U.S.C. § 7701; S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727. The MSPB only has jurisdiction where it is granted by law, rule, or regulation. *Noble v. Tenn. Valley Auth.*, 892 F.2d 1013, 1014 (Fed. Cir. 1989). Those grants are limited to adverse actions against supervisors for prohibited personnel practices; actions taken against employees for unacceptable job performance; and actions taken against employees for "efficiency of the service." 5 U.S.C. § 7513; *see* 5 C.F.R. §§ 1201.3; *see also Fausto*, 484 U.S. at 445-47. None of these specific grants of jurisdiction includes constitutional challenges to statutes.

Furthermore, it is undisputed that the MSPB, an Article I agency, cannot decide constitutional challenges to statutes because it lacks the power to

declare an Act of Congress unconstitutional. *See Johnson*, 415 U.S. at 368; *May v. Office of Pers. Mgmt.*, 38 M.S.P.R. 534, 538 (1988); *Malone v. Dep't of Justice*, 13 M.S.P.B. 81, 83 (1983) ("[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes."); Cert. Opp. 10-11. As a result, when the MSPB is presented with a claim like Petitioners', it must immediately dismiss the claim before any proceedings on the merits, including any record development. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Indeed, that is precisely what happened here to Petitioner Elgin, who sought relief before the MSPB, only to be met with the Government's immediate motion to dismiss, which the MSPB granted, relying on a long line of precedent that prevented it from reaching the merits of Elgin's claims. Pet. App. 101a-02a.

In sum, in funneling the review of employment actions to the MSPB, whose expertise is limited to manager-employee disputes, Congress could not have also intended for facial constitutional challenges to be raised in the MSPB because it lacks the power to strike down federal statutes.

2. The CSRA Does Not Preclude Petitioners' Constitutional Challenges in the District Court Because They Are Collateral to the CSRA's Review Provisions.

Because Petitioners' facial constitutional challenges to 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 are collateral to the scheme created by the CSRA, the CSRA does not preclude district court authority to grant the relief requested. Claims that

"are wholly collateral to a statute's review provisions and outside the agency's expertise" are not precluded by that statute. *Thunder Basin*, 510 U.S. at 212 (internal quotations omitted); *see also Heckler v. Ringer*, 466 U.S. 602, 618 (1984); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990) ("[When] the constitutional claim raises issues totally unrelated to the CSRA procedures . . . a party [can] come directly to district court.").

This Court has consistently found that the district court can review equitable constitutional claims even where there is a statutory review scheme when the claims are collateral to that scheme. For instance, in *Mathews v. Eldridge*, the Court held that district court jurisdiction over a constitutional due process claim was not precluded because it was "entirely collateral" to the comprehensive review scheme governing entitlement to Social Security benefits. 424 U.S. at 330-31. In *Johnson v. Robison*, the Court found that district court jurisdiction over equal protection claims "challenging the constitutionality of laws providing benefits" was not precluded by a statute creating exclusive administrative review procedures for decisions concerning administration of those benefits. 415 U.S. at 373.

And despite a comprehensive scheme allowing only administrative review of immigration status, in *McNary*, 498 U.S. at 494, the Court explained that, because the plaintiff's "action [did] not seek review on the merits of a denial of a particular application, the district court's general federal-question

jurisdiction under 28 U. S. C. § 1331 to hear this action remain[ed] unimpaired."

Given that Petitioners' claims are "entirely collateral" to the purpose and structure of the CSRA and "outside . . . the expertise" of the MSPB, the CSRA does not preclude their review in the district court. *See Thunder Basin*, 510 U.S. at 212-13 (quoting *Mathews*, 424 U.S. at 330). The CSRA created a scheme whereby the MSPB would adjudicate disputes between agency managers and their employees. A facial challenge to the constitutionality of a statute under which an employee was fired would not "involve the courts in day-to-day determination and interpretation" of agency policy; they are wholly collateral to the policy the MSPB is charged with administering. *See Johnson*, 415 U.S. at 372. Administrative review schemes have been held by this Court to preclude only those constitutional challenges that involve the types of claims the scheme was designed to handle, not challenges to the background statutes themselves. *Thunder Basin*, 510 U.S. at 212; *McNary*, 498 U.S. at 492.

Petitioners' claims are even further removed from the Congressional review scheme than the claims in, for example, *Johnson* because the statutes at issue here—5 U.S.C. § 3328 and 50 U.S.C. app. § 453—are not even a part of the review scheme that purportedly precludes the district court's authority to award equitable relief. Far from being a part of the CSRA, 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 implement policies relating to the Selective Service

registration requirement, not to the adjudication of employer-employee disputes.[3]

The Court's decision in *Fausto*, by contrast, underscores the collateral nature of Petitioners' constitutional challenge. As discussed above (at 27-29), this Court's holding in *Fausto* is inapposite because it involved the question whether the CSRA precluded a *statutory* claim, not a *constitutional* claim. *Fausto* also held that the CSRA precluded a statutory Back Pay Act claim that was the type of employment dispute the MPSB was designed to consider: whether an employee engaged in the unauthorized use of a government vehicle. *See* 5 C.F.R. § 1201.3(a)(2); 31 U.S.C. § 1349(b). Here, unlike the claim in *Fausto*, Petitioners' claims are not based on a dispute between management and its employees, but rather on the facial constitutional defects of federal statutes. In other words, not only did *Fausto* not involve a constitutional claim, it was

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[3] The "wholly collateral" nature of Petitioners' claims is underscored by the following hypothetical. Assume that the plaintiff, a Selective Service non-registrant, seeks a district court declaration that he may not be subjected to the criminal penalties set forth in 50 U.S.C. app. § 462(a) because the men-only Selective Service registration requirement violates his constitutional right to equal protection. The district court would indisputably have authority to resolve such a claim, and the Government would, Petitioners believe, concede that neither the MSPB nor the Federal Circuit on appeal from the MSPB would have authority to resolve it. Petitioners' equal protection claims are identical in substance to the one described in the hypothetical, and those claims are "wholly collateral" to the CSRA, to the same degree as the hypothetical claim, because they have nothing to do with the terms and conditions of federal employment.

not a collateral challenge to the statute under which the employee was fired.

For these reasons as well, Petitioners' claims are not precluded by the CSRA.

B. The Federal Circuit Cannot Provide Petitioners With a Remedy for Their Constitutional Injuries.

Petitioners challenge 50 U.S.C. app. § 453(a), which requires that men—but not women—register with the Selective Service, as a denial of equal protection. Petitioners also challenge 5 U.S.C. § 3328, which provides that men who knowingly and willfully fail to register with the Selective Service System are ineligible for Executive agency employment, as both a denial of equal protection and a bill of attainder. JA 26-28. Beyond the reasons set out above, Petitioners' claims are properly brought in district court because, as a practical matter, Petitioners cannot obtain a remedy by bringing their constitutional challenges in the MSPB and, thereafter, appealing to the Federal Circuit.

To reiterate: No one disputes that the MSPB lacks authority to hear and decide Petitioners' facial constitutional claims. *See* Cert. Opp. 10-11; *Thunder Basin*, 510 U.S. at 215; *Johnson*, 415 U.S. at 368. Similarly, no one contends that the parties could take discovery in the MSPB or that the MSPB could make a record on a constitutional claim that it lacked the power to remedy. Rather, the First Circuit below assumed that the Federal Circuit would take on the constitutional question for the first time on appeal. Pet. App. 11a. The jurisdictional gymnastics

endorsed by the First Circuit are problematic because they not only disregard the MSPB's and the Federal Circuit's practices and rulings regarding their own jurisdictions, but also because they leave Petitioners without a forum to develop the factual record necessary to prevail on the merits.

1. The Federal Circuit Cannot Properly Evaluate the Merits of Petitioners' Constitutional Claims Because the Tribunal Below Did Not Develop a Factual Record.

The Federal Circuit cannot review Petitioners' equitable constitutional claims, which require resolution of mixed questions of law and fact, because its jurisdiction is derivative of the MSPB's jurisdiction and the facts relevant to their claims would not have been developed before the MSPB. *See* 5 U.S.C. § 7703(c) ("[T]he Federal Circuit shall review the record.").[4]

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[4] *See also Schmittling v. Dep't of Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) ("If the Board lacks jurisdiction, we also are without authority to hear the merits of the appeal."); *Perez v. Merit Sys. Prot. Bd.*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits of Perez's challenge . . . were not before the MSPB for decision; nor are they before us."); *Manning v. Merit Sys. Prot. Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) ("If the MSPB does not have jurisdiction, neither do we . . . ."); *Rosano v. Dep't of Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) ("[T]he scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the board."); *Billops v. Dep't of Air Force*, 725 F.2d 1160, 1164 (8th Cir. 1984) ("[T]he Federal Circuit would not give [a plaintiff] a remedy he desires, a review of the merits of his case" because it is "limited to considering the limited

Petitioners' claims are not unique in requiring the development of a factual record: constitutional claims typically "turn upon the resolution of contested factual issues," *England*, 375 U.S. at 416, and even many facial constitutional claims, like those pressed here, require a factual record for decision. *See Citizens United v. FEC*, 130 S. Ct. 876, 933 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that "through the normal process of litigation, the parties could have developed a [factual] record" regarding the relevant facial challenge); *see also, e.g., Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 664-65 (1994); *FEC v. Colo. Republican Fed. Campaign Comm.*, 96 F.3d 471, 472-73 (10th Cir. 1996).

Here Petitioners' constitutional claims cannot be evaluated by the Federal Circuit because the Federal Circuit's review is limited to the record created before the MSPB, 5 U.S.C. § 7703(c); *see* Fed. R. App. P. 16(a), and that record would not contain facts needed to decide the constitutional claims. For example, Petitioner Elgin appealed to the MSPB, which dismissed his constitutional claims for lack of jurisdiction. The record contained no information relevant to Elgin's facial constitutional challenges. As the government agreed, First Cir. Br. for Defs.-Appellees 26-27, the MSPB record only established Elgin's year of birth, the length of his federal service, the nature of his job, the record of OPM's determination that he knowingly and willfully failed

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ground of the Board's decision to dismiss for lack of jurisdiction.").

to register for selective service, and the agency's notice of his proposed termination. *See* Pet. App. 95a-98a. Though Elgin raised his bill of attainder and equal protection claims in the MSPB, because the MSPB lacks the power to decide that an Act of Congress is unconstitutional, the record did not include any facts related to, for example, the role of women in the military—facts that would be crucial for considering his constitutional claims. Thus, to "subject [Petitioners] to the processes of an impotent administrative tribunal"—one that cannot provide a remedy or create a factual record for judicial review of their facial constitutional challenges—would be to "command [them] to perform a useless action." *Republic Indus., Inc. v. Cent. Penn. Teamsters Pension Fund*, 693 F.2d 290, 296 (3d Cir. 1982).

In addition, unlike a district court, the Federal Circuit, like other courts of appeals, is not a forum in which the parties may develop the necessary factual record in the first instance. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In *Shalala v. Illinois Council on Long Term Care, Inc.*, a plaintiff brought statutory and constitutional challenges to Medicare-related regulations against the Secretary of Health and Human Services in the district court. 529 U.S. 1, 6-7 (2000). The Court held that the plaintiff was required to first proceed in the federal agency, which might not be able to decide the constitutional claim, because the reviewing district court, unlike the Federal Circuit here, had "the authority to develop an evidentiary record" to resolve the claim. *See id.* at 23-24.

But, as an appellate court, the Federal Circuit does not have the authority to develop an evidentiary record; it cannot accept new evidence and make factual determinations regarding the evidence presented. *See* Fed. R. App. P. 16(a), 17. The Federal Rules of Appellate Procedure include no rule authorizing discovery. Litigants in the Federal Circuit, as in other courts of appeals, cannot propound interrogatories, take depositions, or request documents. Equally important, the litigants cannot make an appellate record on their own through submission of declarations, documents, and other evidence. And the Federal Circuit cannot resolve contested issues of fact, as a district court can. *See Icicle Seafoods, Inc. v. Worthingon*, 475 U.S. 709, 714 (1986); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 875 (Fed. Cir. 2008). Recognizing this, the Federal Circuit does not decide an issue for the first time on appeal when a factual record is necessary to determine the issue but has not been developed below. *See Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1313 (Fed. Cir. 2003).

2. Petitioners' Claims Cannot Be Adjudicated Without a Factual Record.

The factual record required by this case illustrates that federal employees' equitable constitutional claims belong in a forum in which a factual record can be created. To be sure, a district court may choose to decide a facial constitutional claim as a pure matter of law without developing a record, but the district court may also determine that it needs a record. *See Goldberg v. Rostker*, 509 F. Supp. 586, 589 n.3 (E.D. Pa. 1980), *rev'd* 453 U.S.

57. Petitioners ask this Court to hold that the district court has authority to consider Petitioners' claims and to reverse and remand to the First Circuit, where they will reiterate their request for a remand to the district court for discovery and the development of a factual record.

a. Bill of Attainder

In the district court, Petitioners did not seek to conduct discovery on their bill of attainder claim, but the Government found it necessary to create a factual record in the district court to support its argument that 5 U.S.C. § 3328 is not a bill of attainder. Petitioners had argued that § 3328 violates Article I, Section 9, Clause 3 of the U.S. Constitution, which prohibits bills of attainder, because the statute identifies an easily ascertainable group—men 26 and over who failed to register—and subjects that group to punishment (a bar to federal employment) without judicial trial. The district court initially granted Petitioners' motion for partial summary judgment on their bill of attainder claim, finding that § 3328's bar to federal employment identified an ascertainable class of men based on immutable past conduct and operated as a punishment without trial. Pet. App. 66a-67a. The district court noted twice that OPM treated "the 'knowingly and willfully' element as essentially an irrebuttable presumption," *id.* at 75a, 85a, thus rejecting the Government's argument that it is difficult to ascertain which men, among those who have not registered for selective service, would be found by OPM to have knowingly and willfully failed to register. *See Selective Serv. Sys. v. Minn. Pub.*

Interest Research Grp., 468 U.S. 841, 847 (1984) (holding that an unconstitutional bill of attainder must specify the affected persons).

With its motion for reconsideration, the Government submitted the declaration of an OPM Human Resources Specialist, who supplied determination letters for employees other than Petitioners in which OPM had found that the failure to register was not knowing or willful. Dist. Ct. Doc. 53-2, Decl. of Kimberly T. Call. The purpose of the Government's submission was to persuade the district court to abandon its initial *factual* conclusion that a person's non-registration for the Selective Service created an irrebuttable presumption that such a failure was "knowing" and "willful." Dist. Ct. Doc. 53, Memo. of Law Defs.' Mot. for Recons. 13 n.9. Later, the district court requested a report, for inclusion in the record and, presumably, potential fact-finding, regarding OPM's guidelines and policies for making "knowing and willful" determinations. Dist. Ct. Doc. 66, Tr. of Prelim. Inj. Hr'g 63:19-64:3; *see* JA 42.

If the bill of attainder claim had been adjudicated for the first time in the Federal Circuit, arriving at that court from an administrative adjudicator that had immediately dismissed the claim for lack of jurisdiction, there would have been no means of addressing the contested factual issue whether § 3328 identifies an easily ascertainable group for bill of attainder purposes.

b. Equal Protection

In *Rostker v. Goldberg*, relying heavily on contemporaneous congressional testimony, this Court held that the exclusion of women from Selective Service registration did not violate the right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. 453 U.S. at 78-79. The district court here dismissed Petitioners' equal protection claim under *Rostker*. Pet. App. 87a. But that conclusion misconceived *Rostker*'s holding as well as Petitioners' claims. Petitioners challenge *Rostker* by contending that the facts underpinning it are no longer true. To that end, they have repeatedly and consistently asked for an opportunity to take discovery on this issue. Dist. Ct. Doc. 12, Pls.' Opp. to Defs.' Mot. to Dismiss 8-11; First Cir. Br. of the Pls./Appellants 2, 46-61; First Cir. Oral Arg. at 13:06, *available at* http://www.law.georgetown.edu/clinics/ipr/Elgin1stCircuitargument.mp3.

i. Petitioners Need a Factual Record to Show That the Increasing Involvement of Women in Combat Operations Undercuts *Rostker*'s Factual Premise.

Rostker's 6-3 decision was premised, among other factual bases, on the ineligibility of women for combat positions. *Rostker*, 453 U.S. at 77-78. Because women and men were not "similarly situated" with regard to their eligibility for combat positions, the Court concluded that they need not be treated in the same manner just to "engage in gestures of superficial equality." *Id.* at 78-79. As a result, the Court did not address the question

whether excluding women from registration "substantially" furthers the important government interest in "raising and supporting armies," as required to satisfy constitutional challenges to gender-based statutory classifications. *Id.* at 70, 75; *see Craig v. Boren*, 429 U.S. 190, 204 (1976). Rather, the Court held only that excluding women from registration is "sufficiently" and "closely related to" the congressional purpose in mobilizing troops for combat duty. *Rostker*, 453 U.S. at 79.[5]

Rostker was based entirely on what the Court characterized as "the current thinking as to the place of women in the Armed Services." *Id.* at 71. The thrust of Petitioners' claim is that the "current thinking" in regard to women's role in the military has changed dramatically in the past thirty years. JA 3. Because Petitioners' equal protection claim alleged sufficient facts challenging *Rostker*'s premise that men and women are not similarly situated with respect to combat positions, Petitioners should have the opportunity to demonstrate, through the development of a factual record, that *Rostker* should be revisited in light of the current role of women in the military. Petitioners' factual allegation that women and men are now similarly, albeit not identically, situated attacks *Rostker*'s factual premise and thus the constitutionality of the male-only registration requirement. Indeed, the force of *stare decisis* is at its low point when the underlying

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[5] In *Rostker*, although the three-judge panel that heard the case "contemplated a hearing to develop a factual record," the parties were able to agree to a five-volume Joint Documentary and Stipulated Record. *Goldberg*, 509 F. Supp. at 589 n.3.

facts are so changed that they can no longer justify the decision. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1822 (2009) (Thomas, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (Overruling precedent may be legitimate when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."). "In cases involving constitutional issues" that turn on a particular set of factual assumptions, the court "must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

The role of women in the military, particularly in combat, has changed substantially since 1981. *See generally* Maj. Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, 2009 Army Law. 1 (2009). Statutes and policies excluding women from combat, on which *Rostker* relied, have been repealed or changed. 453 U.S. at 77-78. In 1991, Congress repealed a statute forbidding women from serving as combat pilots in the Air Force and Navy. JA 24; 10 U.S.C. § 8549, *repealed by* Pub. L. No. 102-190 § 531(a)(1), 105 Stat. 1365 (1991). In 1993, Congress repealed a statute restricting women from serving on Navy combat ships. JA 24; 10 U.S.C. § 6015, *repealed by* Pub. L. No. 103-160 § 541(a), 107 Stat. 1659 (1993). In 1994, Secretary of Defense Les Aspin replaced the "risk rule," which prohibited the assignment of women in noncombat positions if the likelihood of being

exposed to "direct combat, hostile fire, or capture are equal to or greater than" the risks for the combat units they supported, with the "direct ground combat rule," which prohibits women from "engaging an enemy on the ground . . . while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel." Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96, 140-42 (2008). The direct ground combat rule opened up many positions in which women were prohibited from serving in 1981. *See* U.S. Gov't Accountability Office, GAO/NSIAD-96-169 *Physically Demanding Jobs: Services Have Little Data on Ability of Personnel to Perform* 2 (1996).

Furthermore, although the direct ground combat rule prohibits women from being assigned to units in direct combat on the ground, Petitioners seek to develop a factual record in the district court demonstrating that the realities of recent wars have routinely placed women in such positions. Because there is no front line separating combat units from noncombat units, female soldiers regularly face combat, and, in fact, their units are more frequently targeted by insurgents than male soldiers in direct combat units. JA 25-26; Margaret C. Harrell, et al., *Assessing the Assignment Policy for Army Women* 5-6, Rand Nat'l Defense Research Inst. (2007), http://www.rand.org/pubs/monographs/MG590-1. Thousands of women received "Combat Action Badges," which are awarded for "special recognition to Soldiers who personally engage the enemy or are engaged by the enemy during combat operations." JA

25. Adm. Michael G. Mullen, Chairman of the Joint Chiefs of Staff, stated that "women are assigned to units and positions that may necessitate combat actions." Nominations before the S. Armed Servs. Comm., 111th Cong. 1286 (2009).

Petitioners want to develop a record showing that women are presently engaged in what historically has been considered combat. *See, e.g.*, Dave Moniz, *Female Amputees Make Clear that All Troops are on Front Lines: Reality in Iraq has Overtaken Long-Running Debate at Home*, USA Today, Apr. 28, 2005, at A1. Unlike in 1981, when women were in fact excluded from all combat positions, women are now excluded from some combat positions by policy but nevertheless end up engaging in combat. *See* 152 Cong. Rec. S8542 (daily ed. Aug. 1, 2006) (statement of Sen. Robert Menendez) ("The Army has expanded the role of women in ground-combat operations."). Thus, concluding that women are not similarly situated with men because of the mechanical line the direct combat unit exclusion policy draws "risk[s] 'bypass[ing] any equal protection scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 529 (1996) (second alteration in original).

ii. **Petitioners Need a Factual Record to Show That the Male-Only Registration Requirement Does Not Substantially Further an Important Government Interest.**

Once Petitioners establish that men and women are sufficiently similarly situated with regard to combat positions, the Government must prove, with facts, that excluding women from Selective Service

registration substantially furthers the important government interest in "raising and supporting armies." *See Rostker*, 453 U.S. at 70. Petitioners want to develop a factual record to establish that the government cannot meet its burden.

First, the Court in *Rostker* noted that "any future draft . . . would be characterized by a need for combat troops." *Id.* at 76. But that was when the draft was needed to supply combat troops to repel a Soviet invasion of Europe. As we engage in the global war on terrorism, it is unclear whether the primary purpose of any future draft would be to supply front-line combat troops.

Petitioners want to create a record on the link between conscription and combat. Specifically, Petitioners need to know in what positions draftees will likely serve. At minimum, Petitioners expect to prove through development of a factual record that future draftees likely would serve in hard-to-fill roles, such as Arabic translators, doctors, nurses, and computer specialists. *See, e.g.*, 50 U.S.C. app. § 460(h)(1); Eric Rosenberg, *Special Skills Draft on Drawing Board*, S.F. Chronicle (Mar. 13, 2004). This factual development would buttress Petitioners' argument that prohibiting female nurses, translators, and computer experts from registering with Selective Service, while requiring blind men, amputees, those with mental deficits or illnesses, and convicted felons to register, would not substantially help meet the military's future needs. JA 23-24. Indeed, in Afghanistan, female soldiers do what male soldiers often cannot: gather intelligence from and frisk Afghan women. Lolita C. Baldor,

Death Highlights Women's Role in Special Ops Teams, Associated Press, Oct. 25, 2011, *available at* http://news.yahoo.com/death-highlights-womens-role-special-ops-teams-195034667.html.

Moreover, any additional burden created by including women in Selective Service registration plans would not be a valid justification for sex discrimination. *See Craig*, 429 U.S. at 198. In anticipation of the government's possible argument that the economic burden of registering women justifies disparate treatment, Petitioners want to develop a factual record showing that the cost of requiring women to register with Selective Service would not be unduly burdensome. *See, e.g.*, U.S. Gov't Accountability Office, 1 GAO/NSIAD-98-199, *Gender Issues–Changes Would be Needed to Expand Selective Service Registration to Women*, *available at* http://www.gao.gov/archive/1998/ns98199.pdf (estimating that Selective Service would need only 17 to 20 additional staff to expand registration to women).

In sum, Petitioners' constitutional claims require the creation of a factual record and factual determinations. For this reason as well, it is implausible to ascribe to Congress the intent to impliedly remove the authority of the district court to resolve Petitioners' constitutional claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

50 U.S.C. app. § 453. Registration

(a) Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

(b) Regulations prescribed pursuant to subsection (a) may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.

RESPONDENT'S BRIEF

No. 11-45

In the Supreme Court of the United States

MICHAEL B. ELGIN, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, precludes petitioners from seeking equitable relief in district court based on allegations that they were unconstitutionally terminated from federal employment.

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In the Supreme Court of the United States

No. 11-45

MICHAEL B. ELGIN, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 641 F.3d 6. The opinion of the district court granting petitioners' motion for partial summary judgment and denying in part and granting in part respondents' motion to dismiss (Pet. App. 65a-93a) is reported at 594 F. Supp. 2d 133. The opinion of the district court granting respondents' motion for reconsideration (Pet. App. 39a-64a) is reported at 697 F. Supp. 2d 187.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. The petition for a writ of certiorari was filed on July 7, 2011 and was granted on October 17,

2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978) (S. Rep. 95-969)). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judgment." *Id.* at 444-445 (citations omitted); accord S. Rep. No. 95-969, at 63.

"Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

b. Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*). *Fausto*, 484 U.S. at 445. The CSRA "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445. The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of administrative and judicial review," *id.* at 443.

The CSRA essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the CSRA provides as follows: (1) "for major personnel actions specified in the statute ('adverse actions')," there is an explicit right to administrative proceedings followed by judicial review in the Federal Circuit, *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); (2) for specified "personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel practices')," there are administrative proceedings followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (3) for minor personnel matters involving bargaining-unit employees, there is a grievance procedure followed by binding arbitration and limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, 7123.

c. Of particular relevance here are the CSRA procedures applicable when an employing agency takes an

adverse action, including removal, against a non-probationary competitive-service employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see 5 U.S.C. 7501(1), 7511-7514, 7701-7703 (2006 & Supp. IV 2010). As an initial matter, when an employing agency takes such an action, it must provide the employee with advance written notice of the action and the specific reasons for it, 5 U.S.C. 7513(b)(1); give the employee a chance to respond, either orally or in writing, and to submit documentary evidence supporting that response, 5 U.S.C. 7513(b)(2); allow the employee to be "represented by an attorney or other representative" during that process, 5 U.S.C. 7513(b)(3); and provide a final "written decision," including the agency's final reasoning, "at the earliest practicable date," 5 U.S.C. 7513(b)(4).

An employee who remains aggrieved following these internal agency procedures may appeal the agency's action to the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see 5 U.S.C. 7513(d); see also 5 U.S.C. 1201, 1204; 5 C.F.R. 1201.3. The employee is entitled to a hearing before the MSPB and to be represented by an attorney or other representative. 5 U.S.C. 7701(a); see also 5 C.F.R. 1201.11-1201.113 (regulations describing MSPB procedures). To assist in the development of evidence, the MSPB (as well as any individual member, administrative law judge, or designated employee) has statutory authority to issue testimonial and documentary subpoenas and to order depositions and interrogatories. 5 U.S.C. 1204(b)(2); see 5 C.F.R. 1201.71-1201.75, 1201.81-1201.85. If the MSPB decides in favor of the employee and reverses the employing agency's removal action, it is empowered to ensure that

the employee is "returned to the status quo ante" by ordering appropriate relief, including reinstatement and backpay, and it may also award attorney fees. *Smith* v. *Department of the Army*, 458 F.3d 1359, 1364 (Fed. Cir. 2006) (citation omitted); see 5 U.S.C. 1204(a)(2), 7701(g).

If an employee does not obtain the relief he seeks from the MSPB, he "may obtain judicial review" of the MSPB's order or decision. 5 U.S.C. 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such judicial review is the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(b). The Federal Circuit's jurisdiction in such circumstances is "exclusive." 28 U.S.C. 1295(a)(9). The Federal Circuit must review the record and "hold unlawful and set aside any agency action, findings, or conclusions found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; procedurally improper; or "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. a. Petitioners are four former federal employees who were discharged (or allegedly constructively discharged) by their employing agencies based on their failure to comply with their legal duty to register for the Selective Service. Pet. App. 3a. The Military Selective Service Act requires all male U.S. citizens and permanent-resident aliens between the ages of 18 and 26 to register for the military draft in the manner prescribed by the President. See 50 U.S.C. App. 453(a). Although President Ford briefly suspended the selective-service-registration requirements in 1975, President Carter reinstituted them in 1980 for men born on or after January 1, 1960, and they remain in force today. 50 U.S.C. App. 453 note. All persons are now deemed by law to have notice of their registration re-

quirements. 50 U.S.C. App. 465(a). Knowing failure to register, or falsified registration, is a federal crime punishable by up to five years of imprisonment, a fine up to $10,000, or both. 50 U.S.C. App. 462(a).

In 1985, Congress passed a law, codified at 5 U.S.C. 3328(a), disqualifying from federal employment anyone who has "knowingly and willfully" failed to comply with selective-service-registration requirements. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Congress further directed the Office of Personnel Management (OPM) to promulgate implementing regulations, including regulations prescribing procedures for determining whether a failure to register was "knowing and willful." 5 U.S.C. 3328(b). OPM's implementing regulations, first issued in 1987, require agencies to advise draft-eligible employees (and applicants) younger than 26, who still have the opportunity to register with the Selective Service, to do so promptly. 5 C.F.R. 300.705(c); see 52 Fed. Reg. 7400-7401 (Mar. 11, 1987). The regulations further require agencies to terminate employees over the age of 26 who never complied with their legal obligation to register with the Selective Service, unless OPM determines in response to the employee's explanation that the failure was not knowing and willful. 5 C.F.R. 300.705(d), .707; see 5 C.F.R. 300.706 (procedures for OPM determination); see also 76 Fed. Reg. 75,351 (Nov. 29, 2011) (proposed regulatory amendments not directly relevant here).

b. The Selective Service system contains no record that any of petitioners registered between the ages of 18 and 26. J.A. 13-14, 16-18. Nevertheless, petitioners were hired and employed for varying periods of time by federal agencies. *Ibid.* When the employing agencies

later discovered petitioners' failure to register, they notified OPM. J.A. 14, 17, 19. In the case of three petitioners, OPM determined that the failure to register precluded eligibility for federal employment, and the employing agencies terminated those petitioners. J.A. 15, 17, 19. The fourth petitioner, Henry Tucker, resigned his federal employment after the matter was referred to OPM, and alleges that he was constructively discharged. J.A. 17; Pet. App. 3a.

Only one petitioner, Michael Elgin, sought any review of his removal under the CSRA procedures described above (pp. 3-5, *supra*). Elgin appealed his removal to the MSPB, arguing (1) that Section 3328 is an unconstitutional bill of attainder and (2) that his termination was gender-discriminatory. J.A. 15. His appeal was referred to an administrative judge for an initial decision. Pet. App. 94a; see 5 U.S.C. 7701(b)(1) (permitting referral of MSPB appeals to administrative judge); see also 5 C.F.R. 1201.111.

The administrative judge dismissed the appeal "for lack of jurisdiction." Pet. App. 95a. She agreed with the argument of Elgin's employing agency (the Department of the Treasury) that the MSPB had no jurisdiction to review a removal premised on a determination that the employee's initial appointment violated an absolute statutory prohibition on employment in the civil service. Pet. App. 100a-101a. She further stated that Elgin's constitutional challenge to Section 3328 did not itself suffice to "confer jurisdiction" on the MSPB, because the MSPB "lacks authority to determine the constitutionality of a statute." *Id.* at 101a.

The decision advised Elgin of his rights to petition for review by the full MSPB and to appeal a final MSPB decision to the Federal Circuit. Pet. App. 105a-107a; see

also 5 C.F.R. 1201.113 and .114 (describing procedures for petitioning for full MSPB review). Elgin pursued neither option. Pet. App. 4a.

3. Petitioners subsequently filed this putative class-action suit in the District of Massachusetts, asserting claims under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) and the Declaratory Judgment Act (28 U.S.C. 2201 and 2202). J.A. 3-30. They do not presently contest that they knowingly and willfully failed to register for the Selective Service. Pet. App. 3a. Nor do they presently contest that 5 U.S.C. 3328 and OPM regulations required their removal. They instead contend that Section 3328 is unconstitutional, alleging both that it is a bill of attainder and that it (in combination with the selective-service statute) discriminates on the basis of gender in violation of the equal-protection component of the Fifth Amendment. J.A. 26-28; see U.S. Const. Art. I, § 9, Cl. 3 ("No Bill of Attainder * * * shall be passed."); U.S. Const. Amend. V. They seek a declaratory judgment that 5 U.S.C. 3328 is unconstitutional; injunctive relief barring enforcement of Section 3328; and reinstatement to their former positions with full backpay and benefits. J.A. 29-30.

The district court initially dismissed the equal-protection claim but granted partial summary judgment for petitioners on the bill-of-attainder claim. Pet. App. 65a-93a. The court reasoned that the equal-protection issue was controlled by this Court's decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), which rejected an equal-protection challenge to the Military Selective Service Act. Pet. App. 86a-93a. But the court initially took the view that Section 3328 is an unlawful bill of attainder, *i.e.*, "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without pro-

vision of the protections of a judicial trial." *Id.* at 70a (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)); see *id.* at 70a-86a.

The district court subsequently granted the government's motion for reconsideration and dismissed the case. Pet. App. 39a-64a. In its reconsideration motion, the government argued that petitioners' suit was barred because the CSRA provided the exclusive mechanism for challenging their removals. *Id.* at 41a-42a. The district court rejected that argument, *id.* at 43a-51a, but, reconsidering its earlier constitutional analysis, the district court agreed with the government that Section 3328 is not a bill of attainder because "[o]n the day of its enactment, Congress had no way of knowing exactly who would fall into the affected class." *Id.* 63a. "Since no one would be in violation of the statute until six weeks after it passed," the district court explained, "everyone could, in theory, comply." *Ibid.*

4. a. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss petitioners' complaint on jurisdictional grounds. Pet. App. 1a-15a. It reasoned that the CSRA precluded petitioners from challenging their employing agencies' actions in district court. *Id.* at 5a-15a. Petitioners did not dispute, the court of appeals noted, that the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." *Id.* at 6a. And the court concluded, contrary to petitioners' contentions, that the CSRA provides "a route to direct review of their constitutional claims by an Article III court"—namely, the Federal Circuit. *Ibid.*

The court of appeals determined that petitioners' removals were governed by the CSRA's review scheme for adverse actions taken "for such cause as will promote

the efficiency of the service" (5 U.S.C. 7513(a)), which permits removals to be appealed to the MSPB and then to the Federal Circuit. Pet. App. 7a-10a; see pp. 4-5, *supra*. The government conceded in its brief, and the court of appeals agreed, that the administrative judge in Elgin's case had been wrong to conclude (and the Department of the Treasury had been wrong to contend) that the MSPB lacks jurisdiction in cases where an employing agency removes an employee based on Section 3328's statutory bar. Gov't C.A. Br. 31-35; Pet. App. 10a-11a. The court of appeals reasoned that "[t]he CSRA governs 'removals'; nothing in its language suggests that a case involving a statutory bar follows a different route; and the legislative history * * * refutes any such suggestion." Pet. App. 11a.

The court of appeals acknowledged that even though the MSPB would have jurisdiction over the subject matter in an appeal of petitioners' removals, the MSPB might lack authority to address specific arguments. Pet. App. 13a. In particular, the court noted that administrative agencies like the MSPB may lack authority to declare a federal statute unconstitutional. Pet. App. 13a & n.5. But the court of appeals reasoned that "while the [MSPB] may be powerless to strike down [Section 3328], the Federal Circuit on review of the [MSPB] may do so, 5 U.S.C. § 7703(c), and, if it agreed with [petitioners] on the merits, remand to the [MSPB] to grant relief." *Id.* at 13a (citing *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000), and *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994)); see also *id.* at 14a (concluding that the Federal Circuit would likely agree that it could review constitutional claims in this context). The court of appeals observed that "the MSPB is limited" in addressing constitutional claims "only be-

cause of a doctrine that uniquely applies to administrative agencies and *not* to the Federal Circuit or any other Article III court." *Id.* at 14a.

The court of appeals expressed skepticism about the merits of petitioners' constitutional claims, "given that one conflicts with governing Supreme Court precedent and the other ignores the fact that [petitioners] were free to avoid the [Section 3328] bar by timely registration." Pet. App. 14a. "But," it continued, "the CSRA channels removals covered by the CSRA—and thus petitioners' claims—to the Federal Circuit; that principle serves an important purpose; the CSRA provides a remedy for a meritorious facial challenge; and [petitioners] were obliged to use it." *Id.* at 14a-15a (citation omitted). Thus, the court of appeals concluded, the district court should dismiss petitioners' suit "without prejudice to the pursuit of other remedies under the CSRA to the extent that they may be available at this late date." *Id.* at 15a.

b. Judge Stahl concurred in the judgment. Pet. App. 15a-38a. He believed that the district court had jurisdiction to entertain petitioner's suit, but would have affirmed its merits-based dismissal. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the CSRA provided the exclusive route for petitioners to challenge their removals. Petitioners could have appealed their removals to the MSPB, 5 U.S.C. 7513(d), and then sought judicial review in the Federal Circuit of any adverse MSPB decision, 5 U.S.C. 7703. Even if the MSPB (an executive agency) could not have finally decided their constitutional claims, the Federal Circuit (an Article III court) could have. Petitioners were required to avail themselves of the review procedures that the

CSRA provides, and they cannot circumvent those procedures by filing suit directly in district court.

I. Contrary to petitioners' initial contention—which they raise for the first time in this Court—remedies available under the CSRA for constitutional claims are exclusive, not merely optional. There is no dispute that at least some constitutional claims can be meaningfully addressed by appealing an agency's adverse action to the MSPB and then (if necessary) seeking judicial review in the Federal Circuit. And Congress's intent that such CSRA remedies be exclusive "is fairly discernible in the statutory scheme." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

This Court has already held that the CSRA exhibits the requisite congressional design to preclude alternative remedies, *United States* v. *Fausto*, 484 U.S. 439, 452 (1989), and that holding applies with full force here. One of Congress's primary purposes in enacting the CSRA was to replace freestanding district-court suits challenging certain federal-employment activities with a single consolidated scheme for administrative and judicial review. Allowing any federal employee who can couch an employment-related claim in constitutional terms either to opt out of the CSRA entirely, or to bifurcate his challenge between the district court (for constitutional claims) and the Federal Circuit (for nonconstitutional claims), would undo Congress's efforts by reinstating much of the unwieldy system that the CSRA was enacted to eliminate.

Petitioners' argument in favor of that impractical result rests primarily on the assertion that Congress must provide a clear demonstration of its intent to preclude district-court review of constitutional claims. That

assertion is flawed. Congress needs to provide a clear demonstration of its intent only if it wants to foreclose *all* judicial review of a constitutional claim—an extraordinary step that, this Court has cautioned, would raise a serious constitutional question. But the Court has recognized that no such question is raised, and no express statement is required, when Congress merely *channels* judicial review of a constitutional claim to a particular Article III forum—here, the Federal Circuit. Channeling constitutional claims through a specialized scheme of administrative and judicial review is not only well within Congress's authority, but is affirmatively beneficial. It allows nonconstitutional claims to be addressed first (potentially mooting difficult constitutional questions) and permits the agency to weigh in on any statutory, regulatory, or factual issues as to which its expertise may be helpful.

II. As the court of appeals recognized, the CSRA's procedures for administrative and judicial review were fully capable of resolving petitioners' claims that their removals were unlawful because Section 3328 is unconstitutional. Petitioners lack any legal basis for bypassing those procedures in favor of district-court review.

A. The CSRA provides a path for administrative and judicial review of all adverse actions like petitioners' removals. Any employee has the right to appeal such an action to the MSPB and then to the Federal Circuit. The statutory text contains no explicit or implicit exceptions to those rights or to the MSPB's jurisdiction based on the particular grounds, constitutional or otherwise, on which an employee challenges the agency's action.

Even if the MSPB itself lacked authority to adjudicate petitioners' constitutional claims directly, the Federal Circuit was capable of addressing those claims and

of ordering the MSPB to grant any necessary relief. Although some constitutional claims may lie beyond the power of an agency to resolve, this Court has repeatedly recognized that such claims may be addressed in the first instance by an Article III court—including an appellate court—reviewing agency action. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000); *Thunder Basin*, 510 U.S. at 215.

Petitioners err in suggesting that the Federal Circuit cannot resolve constitutional claims like theirs because it will lack an adequate record. Initial judicial review of agency action in an appellate court is quite common, and courts of appeals have several methods for resolving constitutional claims in the first instance. Many constitutional claims (including most facial claims) will require no factual development at all; appellate courts, including this Court, can and do take judicial notice of facts contained in articles, studies, amicus briefs, and the like; and any other factfinding that might in theory be necessary can be performed by the MSPB (either initially or on remand from the Federal Circuit), which has full discovery, subpoena, and evidentiary-hearing authority.

B. Because the CSRA provided an avenue for meaningful judicial review of petitioners' constitutional claims, petitioners were obligated to take that route, rather than to challenge their removals in district court. Petitioners are wrong to suggest that the CSRA, even if otherwise exclusive, nevertheless permits employees to bring "facial constitutional challenges" in district court.

As an initial matter, petitioners' proposed exception to CSRA exclusivity invites extensive, unpredictable, and wasteful litigation about what sorts of claims might fit within it. The dividing line between "facial" and "as-

applied" challenges is imprecise, and it is far from clear that petitioners' own claims are properly characterized as "facial." In any event, petitioners are incorrect in asserting that claims like theirs are "wholly collateral" to the CSRA's review scheme. Petitioners' claims are challenges to their removals—the very type of challenge the CSRA channels to the MSPB and the Federal Circuit. And petitioners raise the same arguments (the asserted unconstitutionality of Section 3328) and seek essentially the same relief (reinstatement with backpay) as they could under the CSRA's specialized scheme.

Moreover, channeling constitutional claims like petitioners' through the CSRA makes good sense. In many cases, an employee challenging the constitutionality of a statute will challenge his removal on other grounds as well, and principles of administrative exhaustion and judicial economy militate in favor of keeping such related claims together before the MSPB and the Federal Circuit. Even if a particular employee forgoes any nonconstitutional claims, channeling his constitutional claims though the CSRA allows any underlying factual issues (such as the constructive-removal allegations of petitioner Tucker here) to benefit from the MSPB's expertise, and assures that any statutory-construction issues (such as issues of constitutional avoidance) tied up with the constitutional questions are resolved by the Federal Circuit. The Federal Circuit would undisputedly be the primary court to review statutory-interpretation issues outside the context of a constitutional challenge to a statute, and Congress would not have intended to discard that court's expertise, and invite inter-circuit conflicts, whenever such issues are intertwined with such a challenge.

ARGUMENT

The CSRA "replaced [a] patchwork system" under which federal personnel decisions could be challenged in a variety of different courts "with an integrated scheme of administrative and judicial review" of certain employment-related agency actions. *United States* v. *Fausto*, 484 U.S. 439, 445 (1987). The procedures the CSRA prescribes, including its procedures for judicial review of constitutional claims, are exclusive. The court of appeals correctly concluded that those procedures gave petitioners a direct path to meaningful judicial review by an Article III court—the Federal Circuit—of their constitutional arguments challenging their removals. Petitioners should not be permitted to subvert the CSRA's careful design by sidestepping Federal Circuit review in favor of an unauthorized suit in district court.

I. FEDERAL EMPLOYEES MAY NOT BYPASS JUDICIAL REVIEW AVAILABLE UNDER THE CSRA BY FILING SUIT IN DISTRICT COURT

In the court of appeals, petitioners "[d]id not contest the view that the statutory route" specified by the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." Pet. App. 6a. Petitioners' primary argument in this Court, however, is that district courts can entertain "all equitable constitutional claims brought by federal employees," Pet. Br. 20, "whether or not" such claims could be redressed under the CSRA, *id.* at 19. On petitioners' view, even if the CSRA provides adequate judicial review of a constitutional claim, the employee may nevertheless circumvent the CSRA altogether (by filing only his constitutional claim in district court) or split his challenge to a single employment action between two different forums (by

filing his constitutional claim in district court and pursuing other claims under the CSRA). Such an impractical result cannot be reconciled with the structure and purpose of the CSRA and with this Court's precedents.

A. A Specialized Statutory Review Scheme Precludes Freestanding Constitutional Claims When Congressional Intent Of Exclusivity Is "Fairly Discernible"

1. Two background premises are undisputed. First, there is no dispute that federal employees can obtain meaningful judicial (and administrative) review of at least some constitutional challenges to adverse actions by following the procedures prescribed in the CSRA. Pet. Br. 19, 33; see pp. 3-5, *supra*. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), for example, this Court recognized that even under the pre-CSRA scheme, constitutional claims (there, that an employee had been demoted in retaliation for the exercise of First Amendment rights) could properly be raised in an administrative appeal of an employing agency's adverse action. *Id.* at 385-387 & n.33. Petitioners accordingly acknowledge in this case that federal employees may raise certain constitutional claims before the MSPB under the CSRA. Pet. Br. 33. And following presentation of such a claim to the MSPB, judicial review would be available in the Federal Circuit. 5 U.S.C. 7703(a)-(c).

Second, there is no dispute that if judicial review were *not* available under the CSRA for a particular employment-related constitutional claim, a federal employee would be entitled to bring a freestanding action for equitable relief. Although the CSRA provides an avenue for judicial review of many types of employment-related actions, including the adverse actions at issue here, it is possible that an agency could take an

employment-related action that would not be judicially reviewable under the CSRA and yet would rise to the level of constitutional significance. See *Bush*, 462 U.S. at 385 n.28. This Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988), requires Congress to make a "heightened showing" of its intent "to deny any judicial forum for a colorable constitutional claim." *Id.* at 603. The government acknowledges that the CSRA does not contain a "heightened showing" of congressional intent to foreclose review of constitutional claims altogether. Accordingly, if the CSRA itself provides no avenue for an employee to obtain judicial review of an employment-related constitutional claim, the employee (after exhausting any administrative remedies) could bring his claim under the Administrative Procedure Act, which provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

2. The dispute between the parties, with respect to petitioners' primary argument, concerns an employee's ability to bring an employment-related constitutional claim in district court *even though* he could obtain judicial review (from the Federal Circuit) of that same claim under the CSRA. Contrary to petitioners' contention (Pet. Br. 26-27), *Webster*'s "heightened showing" rule does not provide the proper framework for resolving that issue. Rather, the proper test is simply whether Congress's intent that the CSRA be exclusive "is fairly discernible in the statutory scheme." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

The question in *Webster*—as well as the other cases on which petitioners primarily rely, including *Johnson*

v. *Robison*, 415 U.S. 361 (1974)—was whether a federal statute should be "construed to deny *any judicial forum* for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (emphasis added); see *Robison*, 415 U.S. at 364-365; *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (discussing *Robison*); see also *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 484, 496-499 (1991) (declining to entirely foreclose meaningful review of a constitutional claim) (cited at Pet. Br. 32, 37-38); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 678 (1986) (similar) (cited at Pet. Br. 26). The Court has recognized that not only would such a construction be "extraordinary," but it would also "raise[] a serious constitutional question of the validity of the statute as so construed." *Salfi*, 422 U.S. at 762. Mindful of those concerns, the Court requires a clear demonstration of congressional intent before it will interpret a statute to bar the door of *every* court to a plaintiff challenging agency action on colorable constitutional grounds. *Ibid.*; *Webster*, 486 U.S. at 603.

Petitioners err in contending that the same rule applies to the question whether judicial review under the CSRA, when available, is exclusive. Their error lies in overlooking "the distinction that this Court has often drawn between a total preclusion of review" (the issue in *Webster* and *Johnson*) and "postponement of review" or "channeling" of review through a particular statutory scheme. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000) (citing cases). The issue petitioners raise—whether a plaintiff is required to challenge agency action (such as a removal) under a special statutory review procedure (such as the CSRA provides), or may alternatively bring suit in district court under the general federal-question-jurisdiction provi-

sion (28 U.S.C. 1331)—is a question of channeling, not of total preclusion. See, *e.g.*, *Illinois Council*, 529 U.S. at 13 (classifying the requirement that claimants challenge certain agency action under a special statute, rather than bringing suit in district court under 28 U.S.C. 1331, as an issue of "channeling"); *Salfi*, 422 U.S. at 762 (distinguishing the total preclusion issue in *Robison* by observing that "[i]n the present case, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions"). Channeling review of a constitutional claim does not present the same concerns as foreclosing it entirely. As this Court has recognized, channeling "is not only of unquestionable constitutionality," but "is also manifestly reasonable," since it can assure an agency the first crack at resolving a plaintiff's objections to its actions, while still allowing for judicial review at the end of the administrative process. *Salfi*, 422 U.S. at 762.

Because channeling "does not implicate the strong presumption that Congress did not mean to prohibit *all* judicial review," no heightened or express showing of congressional intent is required to divest a district court of jurisdiction over the subject matter covered by the special statutory review scheme. *Thunder Basin*, 510 U.S. at 207 n.8 (emphasis added); see also *id.* at 215 n.20; *Illinois Council*, 529 U.S. at 19-20; *Salfi*, 422 U.S. at 762. Instead, the Court applies the same standard, originally described in *Block* v. *Community Nutrition Institute*, that it applies in determining whether nonconstitutional claims are precluded. *Thunder Basin*, 510 U.S. at 207. The *Block* standard is not a strict clear-statement rule, but instead examines a statute's "language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful re-

view" to determine whether Congress's intent to foreclose alternative methods of judicial review is "'fairly discernible in the statutory scheme.'" *Ibid.* (quoting *Block*, 467 U.S. at 351); see also *Block*, 467 U.S. at 349 (exclusivity of statutory review scheme may be demonstrated "by inferences of intent drawn from the statutory scheme as a whole").

In *Block* itself, for example, the Court held that the Agricultural Marketing Agreement Act of 1937 implicitly precluded individual consumers from bringing suit in district court to challenge (on nonconstitutional grounds) certain agricultural marketing orders issued by the Secretary of Agriculture. 467 U.S. at 352. The Court reasoned that the statute expressly permitted judicial review (following exhaustion of administrative remedies) only for dairy handlers, not consumers; that the Act contained no "express provision for participation by consumers in any proceeding"; and that "[a]llowing consumers to sue the Secretary would severely disrupt [the Act's] complex and delicate administrative scheme" by allowing consumers, but not handlers, an exhaustion-free path to court. *Id.* at 345-348. See also, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (inferring preclusion because of the "omission" of affirmative authorization from a "statute's precisely drawn provisions"); *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946) (inferring preclusion because "Congress has provided a special procedure for" reviewing certain administrative orders); *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 306 (1943) (inferring preclusion because Congress "drew a plain line of distinction" by allowing only certain types of judicial review); cf. *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976) (concluding that particular provision implicitly "provides the

exclusive judicial remedy for claims of discrimination in federal employment").

In *Thunder Basin Coal Co.* v. *Reich*, the Court applied the *Block* standard to conclude that Congress had implicitly channeled a constitutional claim exclusively through procedures provided in the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act). 510 U.S. at 202-216. Those procedures set forth a mechanism whereby mine operators could seek administrative and judicial review of certain enforcement actions initiated by the Secretary of Labor. *Id.* at 207-208. Although the Mine Act specified that its procedures were the exclusive avenue for raising "challenges to agency enforcement proceedings," the Mine Act was "facially silent" about the preclusion of "pre-enforcement claims" (*i.e.* suits filed in advance of any Department of Labor enforcement action). *Id.* at 208. The Court nonetheless held that the Mine Act "prevent[ed] a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the Act" that included a constitutional claim (a due-process challenge to the adequacy of the Mine Act's procedures). *Id.* at 202; see *id.* at 205, 215. The Court observed that the Mine Act provided a "detailed structure" for review of enforcement actions by an independent administrative commission and then by a court of appeals, *id.* at 207-208, and that even if the mine commission could not address the constitutional claim in the first instance, the court of appeals could do so in reviewing the commission's decision, *id.* at 215. The Court concluded that permitting mine operators to "evade the statutory-review process" through a pre-enforcement suit would be "inimical to the structure and the purposes of the Mine Act," and found a "'fairly discernible' intent to preclude district court review in the

present case." *Id.* at 216 (quoting *Block*, 467 U.S. at 351); see *id.* at 208 ("The structure of the Mine Act * * * demonstrates that Congress intended to preclude challenges such as the present one."); see also *Illinois Council*, 529 U.S. at 1, 19-20 (holding that constitutional challenges to Medicare regulations had to be brought under 42 U.S.C. 405(g) rather than 28 U.S.C. 1331 and recognizing distinction from total preclusion); *Salfi*, 422 U.S. at 753, 762 (same for constitutional challenges to Social Security Administration orders).

B. Congress Intended That Judicial Review Of Constitutional Claims Available Under The CSRA Be Exclusive

As with the statutes at issue in *Block* and *Thunder Basin*, Congress's intent to preclude alternative forms of judicial review is "fairly discernible" from the CSRA's statutory scheme. Indeed, the Court has already expressly recognized that the CSRA satisfies that standard.

1. In *United States* v. *Fausto*, the Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," 484 U.S. at 445, the absence of a provision in the CSRA for excepted-service employees to obtain judicial review of a suspension meant such employees were precluded from seeking such review under the Back Pay Act of 1966, 5 U.S.C. 5596. *Fausto*, 484 U.S. at 448. The Court concluded that the comprehensive nature of the CSRA made it "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Id.* at 448-449. Addressing the

objection of an amicus who believed that the CSRA should not be interpreted to preclude judicial review, the Court specifically stated that "[h]ere, as in *Block*, we think Congress' intention [to preclude judicial review] is fairly discernible," based on "'inferences of intent drawn from the statutory scheme as a whole.'" *Id.* at 452 (quoting *Block*, 484 U.S. at 452).

Petitioners attempt to distinguish *Fausto* in two ways. Neither has merit. First, they observe (Pet. Br. 27-28, 39-40) that the precluded claim in *Fausto* was statutory, rather than constitutional. But, as explained in the previous section, this Court has applied the "fairly discernible" standard from *Block* not only to the preclusion of statutory claims (the issue in *Fausto*) but also to the channeling of constitutional claims (the issue here). *Thunder Basin*, 510 U.S. at 207, 215. Second, petitioners point out (Pet. Br. 29) that the specific holding of *Fausto* was limited to preclusion only of a specific type of claim, different from the claim at issue here. That is true, but does not make the decision any less relevant. The Court's inquiry into the CSRA's comprehensiveness and exclusivity examined the same provisions "govern-[ing] major adverse action[s]" that are at issue here. 484 U.S. at 446-447. Furthermore, one of the "structural elements" of the CSRA that the Court deemed "important" to its holding was "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." *Id.* at 449 (citing, *inter alia*, 5 U.S.C. 7513(d), 7701, 7703). The "primacy" of the Federal Circuit's "judicial review" is even more directly relevant here than it was in *Fausto* (in which the alternate remedy sought by the plaintiff would itself have been re-

viewed by the Federal Circuit, see *id.* at 443), and there is no reason why the *Block* inquiry should turn out differently.

2. Moreover, even assuming *arguendo* that *Fausto* were not directly controlling, the CSRA would satisfy the "fairly discernible" standard as a matter of first impression. As in *Thunder Basin*, it would be "inimical to the structure and the purposes" of the statute to allow circumvention of the statutory review scheme by seeking review directly in district court. 510 U.S. at 216. The structure of the CSRA scheme at issue here is quite similar to the structure of the Mine Act in *Thunder Basin*: both call for review of initial agency action (an adverse employment action or a mine-related enforcement order) first by an independent body (the MSPB or the mine commission) and then by an appellate court (the Federal Circuit or the regional court of appeals). Compare pp. 3-5, *supra*, with *Thunder Basin*, 510 U.S. at 204, 207-209. Indeed, in one important respect, this is an easier case than *Thunder Basin*. Unlike the Mine Act, the CSRA does not require potential plaintiffs to await an administrative enforcement action in order to obtain review, so this case, unlike *Thunder Basin*, presents no issues of delayed review. Rather, the issue here is simply whether an employee who has already been subject to an adverse action, and who could immediately raise a constitutional challenge to that action through the CSRA's review scheme, can sidestep that scheme by filing suit in district court instead.

Fausto is merely one in a series of cases holding that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies the statute explicitly provides. Five years before *Fausto*, the Court in *Bush* v. *Lucas* declined to recog-

nize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages based on alleged First Amendment violations occurring during the plaintiff's federal employment. 462 U.S. at 368. The Court reasoned that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Ibid.* Although the agency actions at issue in *Bush* took place before the CSRA was enacted, see *id.* at 369-370, the decision discussed the CSRA, see, *e.g.*, *id.* at 385 n.25, and its reasoning applies equally (or even more forcefully) to the CSRA. See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc; per curiam); see also *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989).

A year after *Fausto*, in *Karahalios* v. *National Federation of Federal Employees*, the Court concluded that an employee's right under the CSRA to fair representation by his union could not be enforced through an implied cause of action in district court. 489 U.S. at 529. The Court observed that the CSRA "expressly provide[s]" employees with "an administrative remedy" before the Federal Labor Relations Authority (FLRA) for a union's breach of its duty and allows for judicial review of the FLRA's decision. *Id.* at 533. The Court explained that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional

scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA and to confine the courts to the role given them under the Act." *Id.* at 536-537.

Although these cases do not directly address the *Block* standard, their reasoning strongly supports an inference of CSRA exclusivity in this context. Indeed, consolidation of judicial review, and preclusion of district-court suits in particular, was a "leading purpose" for enacting the CSRA. *Fausto*, 484 U.S. at 444. Before the CSRA, "[s]ince there was no special statutory review proceeding relevant to personnel action," employees were often able to bring the very type of suit at issue here: a district-court suit directly challenging an agency's employment-related action. *Ibid.* Such suits were considered problematic for two reasons. First, the "concurrent jurisdiction" of different courts led to "wide variations in the kinds of decisions issued on the same or similar matters." *Id.* at 445 (quoting S. Rep. 95-969 at 63) (ellipses omitted). Second, filing suit in district court was "wasteful and irrational," because it initiated two rounds of duplicative judicial review: the district court would review the agency's action, and then on appeal the court of appeals would conduct "essentially the same review" all over again, because no deference would be owed to the district court's initial conclusion. *Ibid.*

When Congress, taking account of "the needs of sound and efficient administration," "replaced the [preexisting] patchwork system with [the CSRA's] integrated scheme of administrative and judicial review," it intended to correct, rather than to perpetuate, the flaws of the previous regime. *Fausto*, 484 U.S. at 445. The necessary implication of petitioners' position is that

Congress failed in that effort. If employees were to have the option of choosing whether they will pursue constitutional claims under the CSRA or in district court, there would still be varying "kind of decisions issued on the same or similar matters," and there would still be duplicative review of agency action by district courts and courts of appeals. *Ibid.*; see *Lindahl* v. *OPM*, 470 U.S. 768, 797 (1985) (rejecting interpretation of CSRA that "would result in exactly the sort of duplicative, wasteful, and inefficient judicial review that Congress in the CSRA [as amended] intended to eradicate") (internal quotation marks omitted); *Fausto*, 484 U.S. at 451 (similar). Worse yet, because the CSRA would remain the exclusive route for raising nonconstitutional claims, employees could bifurcate review of a single agency action between a district court and the MSPB and Federal Circuit. Congress is extremely unlikely to have wanted two different adjudicators to review the same action, and it has provided no procedures for coordinating such proceedings.

Channeling constitutional claims through the CSRA's procedures not only avoids such conflicts, but is affirmatively beneficial. As the court of appeals recognized, "[c]onstitutional claims are common in administrative proceedings—especially equal protection and procedural due process claims—and are part of the ordinary fodder of review in discharge cases. Often such claims are made along with factual claims denying the conduct alleged against the employee and statutory or rule-based claims as well." Pet. App. 12a. Accordingly, as this Court has itself observed, channeling constitutional claims through an agency has the benefits of (1) promoting judicial efficiency and constitutional avoidance by preserving the possibility that a favorable deci-

sion on nonconstitutional grounds will moot the constitutional issue, see, *e.g.*, *Aircraft & Diesel Equip. Corp.* v *Hirsch*, 331 U.S. 752, 772-773 (1947); (2) allowing the agency to bring its expertise to bear on the constitutional issues, see *Ruzicka*, 329 U.S. at 294; and (3) providing the agency an opportunity to "produce a useful record for subsequent judicial consideration," *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992).

3. Aside from their mistaken assertion that the *Webster* standard is controlling, petitioners offer little to support their argument that employees with constitutional claims may opt out of the CSRA. First, petitioners point out (Pet. Br. 21-22) that district courts presumptively have jurisdiction over constitutional claims under 28 U.S.C. 1331. But district-court review is not automatically available merely because a claim falls within Section 1331 (as any federal-law claim, whether based on the Constitution, a statute, a regulation, or a treaty would). To the contrary, as already discussed, the Court has repeatedly recognized that Congress can, explicitly or implicitly, channel constitutional claims away from Section 1331's general federal-question jurisdiction and towards a specialized statutory review scheme. See, *e.g.*, *Illinois Council*, 529 U.S. at 1; *Thunder Basin*, 510 U.S. at 202; *Salfi*, 422 U.S. at 753. Indeed, the petitioner in *Thunder Basin* made essentially the same argument that petitioners make here: that a district court should have jurisdiction over a colorable constitutional claim under Section 1331. See Pet. Br. 25, 35-36, *Thunder Basin*, *supra* (No. 92-896). The Court nevertheless held that the Mine Act implicitly "prevent-[ed] the district court from exercising subject-matter

jurisdiction," *Thunder Basin*, 510 U.S. at 202, and there is no reason for a different result here.*

Second, petitioners contend (Pet. Br. 32) that "preclud[ing] district court review of equitable constitutional claims" would "overturn[] a tradition that has existed since the founding of the Nation." That assertion is incorrect. District courts do not occupy any privileged place above other federal courts in the constitutional scheme. The existence of all lower federal courts is wholly within Congress's discretion, as the Constitution simply provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. This Court has long recognized that Congress likewise enjoys discretion to distribute the judicial power among those lower courts as it sees fit: "No one of them can assert a just claim to jurisdiction exclusively conferred on another or withheld from all." *Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850). And Congress often provides for initial review of agency action in the courts of appeals,

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* Just like the implicit Mine Act exclusivity addressed in *Thunder Basin*, CSRA exclusivity is properly considered an issue of subject-matter jurisdiction because it concerns a district court's "statutory * * * power to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted); see *Block*, 467 U.S. at 353 n.4 (stating that "congressional preclusion of judicial review is in effect jurisdictional"). Even if, however, the Court were to conclude that CSRA exclusivity is not a question of subject-matter jurisdiction, all that would change is how dismissals of cases like this should be classified. In this particular case, the proper disposition would be to remand for the lower courts to address whether the government forfeited its ability to seek a nonjurisdictional dismissal based on CSRA exclusivity by failing to raise the issue until its motion for reconsideration in the district court.

rather than the district courts. See, *e.g.*, 28 U.S.C. 2342; 29 U.S.C. 160(f); 33 U.S.C. 921(c); *Thunder Basin*, 510 U.S. at 204.

Finally, petitioners appear to suggest (Pet. Br. 22-25) that because this Court has sometimes recognized an implicit "right of action for equitable relief that arises directly under the Constitution," a district court necessarily has authority to hear any constitutional claim arising out of federal employment. The question whether a cause of action exists, however, is analytically distinct from the subject-matter-jurisdiction question at issue here. See, *e.g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002). Just because the Constitution authorizes an implied cause of action in certain circumstances does not mean that Congress lacks constitutional authority to channel jurisdiction over certain matters to particular courts. See, *e.g.*, *Sheldon*, 49 U.S. at 449.

Indeed, petitioners' focus on causes of action simply highlights an additional defect in their argument—namely, that a federal employee who can adequately raise his constitutional challenge under the CSRA has no cause of action that he could assert in district court. The Administrative Procedure Act (on which petitioners' own complaint relies) "authorizes an action for review of final agency action in the District Court" only when "other statutory procedures are inadequate." *FCC* v. *ITT World Commc'ns Inc.*, 466 U.S. 463, 469 (1984); see 5 U.S.C. 703-704; J.A. 6. And petitioners identify no circumstance in which this Court has created an implied cause of action against the United States purely as an alternative to an adequate preexisting scheme. Cf. *Bush*, 462 U.S. at 368 (declining to authorize a damages remedy for First Amendment violations in the context

of federal employment "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States"). Thus, petitioners' theory of CSRA circumvention fails not only because the district courts lack jurisdiction to entertain constitutional claims arising out of adverse actions like the removals at issue here, but also because Congress has conferred no cause of action authorizing plaintiffs to assert claims such as petitioners' outside the context of the CSRA.

II. PETITIONERS WERE REQUIRED TO PURSUE THEIR CONSTITUTIONAL CLAIMS UNDER THE CSRA

As an alternative to their argument that the CSRA is nonexclusive as to all constitutional claims, petitioners argue more narrowly that the CSRA does not provide the exclusive scheme for resolving their particular bill-of-attainder and equal-protection claims. They mainly contend that those claims fall outside the CSRA altogether, because (in their view) those claims cannot receive adequate judicial review under the CSRA. They also appear to contend that even if the CSRA does provide for meaningful judicial review of those claims, and even if Congress generally intended CSRA remedies to be exclusive, they nevertheless were entitled to proceed directly to district court. Both contentions lack merit.

A. Petitioners Could Obtain Full And Fair Judicial Review Of Their Constitutional Claims Under The CSRA

The court of appeals held that removals based on 5 U.S.C. 3328 fall within the CSRA provisions governing adverse actions undertaken "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see Pet. App. 7a-11a. Petitioners do not challenge that con-

clusion, and any such challenge would be outside the scope of the question presented. Petitioners nonetheless maintain that the normal statutory procedures for contesting a removal "for such cause as will promote the efficiency of the service"—appeal to the MSPB, followed by judicial review in the Federal Circuit, see 5 U.S.C. 7513(d), 7701, 7703—are effectively unavailable to them based on the nature of the issues they seek to raise. That is incorrect. Petitioners, and other employees who similarly contest adverse actions by challenging the constitutionality of a statute, can fully litigate their claims under the CSRA.

1. The CSRA expressly provides that an employee who is removed by his employing agency "is entitled to appeal to the [MPSB] under section 7701 of this title." 5 U.S.C. 7513(d). Section 7701, in turn, states that an employee who appeals from "any action which is appealable to the [MSPB] under any law * * * shall have the right" both "to a hearing" and "to be represented by an attorney or other representative." 5 U.S.C. 7701(a). The MSPB (or administrative law judge or other employee) "shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing." 5 U.S.C. 7701(b)(1). Following MSPB review, "[a]ny employee * * * adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." 5 U.S.C. 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such review is the Federal Circuit. 5 U.S.C. 7703(b)(1).

The plain language of those statutory provisions applies to an employee who challenges his removal on the ground that the statute requiring it is unconstitutional no less than it applies to an employee who challenges his

removal on any other ground. An employee raising a constitutional claim is a removed employee "entitled to appeal to the [MSPB]," 5 U.S.C. 7513(d); entitled to a hearing and a decision before the MSPB, 5 U.S.C. 7701(a)-(b); and entitled thereafter to judicial review in the Federal Circuit, 5 U.S.C. 7703(a)(1) and (b)(1). Nothing in the statute uniquely disqualifies employees raising constitutional challenges to statutes from availing themselves of the review scheme provided as a matter of right to all employees whose removals are covered by 5 U.S.C. 7512 and 7513.

Petitioners accordingly misunderstand the nature of the MSPB's jurisdiction when they assert (Pet. Br. 35-36) that no statute or regulation "grants * * * jurisdiction" to the MSPB to review constitutional challenges to statutes. The MSPB's jurisdiction, as just explained, is premised on the *type* of agency action challenged, not the *grounds* on which it is challenged. As the court of appeals observed, "Congress' desire to consolidate employee removal in a single forum was based on the action taken against the employee rather than the precise arguments made in contesting that action." Pet. App. 12a-13a. Indeed, an employee will often challenge his removal on multiple grounds, be they factual, regulatory, statutory, or constitutional. *Id.* at 12a. Regardless of the particular mix of claims, "[a]n employee against whom an action is taken under [Section 7513] is entitled to appeal to the [MSPB]." 5 U.S.C. 7513(d).

Petitioners have identified no MSPB or Federal Circuit authority to the contrary. In the petition, they cited several nonprecedential administrative opinions, including the administrative judge's opinion in petitioner Elgin's case, suggesting that the MSPB lacks "jurisdiction" to hear the appeal of an employee whose original

appointment was barred by statute. Pet. 28 & n.5; see 5 C.F.R. 1201.113 (decisions of an individual MSPB administrative judge are nonprecedential). But those opinions (in addition to being nonprecedential) address the types of persons and employment actions, not the types of issues, that fall within the statutory scheme. Moreover, the court of appeals correctly concluded—in a portion of its decision that petitioners do not challenge—that those "jurisdictional" rulings are incorrect insofar as they could be read to suggest that Section 3328 removals fall outside the CSRA's review scheme for adverse actions. Pet. App. 10a-11a; see also *Daneshpayeh* v. *Department of the Air Force*, No. 93-3476, 1994 WL 18964, at *2 n.4 (Fed. Cir. Jan. 26, 1994) (per curiam) (characterizing "boiler-plate labelling" of such a decision "as based on 'lack of jurisdiction'" as "harmless error").

2. Petitioners argue (Pet. Br. 35-36) that the CSRA nevertheless fails to provide an adequate avenue for raising their constitutional arguments, reasoning that "the MSPB, an [administrative] agency, cannot decide constitutional challenges to statutes because it lacks the power to declare an Act of Congress unconstitutional." Petitioners are correct that administrative agencies at least sometimes lack such authority, a limitation that this Court has loosely described as implicating the scope of the agency's "jurisdiction." *Thunder Basin*, 510 U.S. at 215; cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'") (quoting *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 90 (1998)). But even if the MSPB lacks authority to decide certain constitutional claims, that would not render the CSRA's statutory scheme inapplicable to such claims. Instead,

as the court of appeals recognized, all it would mean is that the Federal Circuit would address the constitutional argument in the first instance. Pet. App. 13a.

This Court has previously recognized that a statutory scheme that combines administrative and judicial review can provide meaningful relief for a constitutional claim even when that claim cannot be addressed during the administrative portion of the proceedings. In *Thunder Basin*, the Court considered a scheme that, like the CSRA scheme at issue here, called for initial review of agency action by an independent commission, followed by review of the commission's decision in a court of appeals. 510 U.S. at 204. The Court held that the plaintiff could—indeed, was required to—bring its constitutional claim under that scheme, notwithstanding the possibility that the administrative commission would be unable to address it. *Id.* at 215. The Court reasoned that even if the commission could not grant relief, the "constitutional claims here can be meaningfully addressed in the Court of Appeals." *Ibid.*

Similarly, in *Shalala* v. *Illinois Council on Long Term Care, Inc.*, the Court again concluded that a statutory scheme for administrative and judicial review (there, under the Medicare Act) provided adequate relief for a constitutional claim, notwithstanding limitations on "the extent to which the agency itself will provide the administrative review channel leading to judicial review." 529 U.S. at 23. "The fact that the agency might not provide a hearing for [a] *particular contention*," the Court explained, "is beside the point because it is the 'action' arising under the Medicare Act that must be channeled through the agency." *Ibid.* "After the action has been so channeled, the court will consider the contention when it later reviews the action. And a

court reviewing an agency determination under [the judicial-review statute applicable to Medicare challenges] has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide." *Ibid.* (citing *Thunder Basin*, 510 U.S. at 215 & n.20; *Haitian Refugee Ctr.*, 498 U.S. at 494; *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984); *Salfi*, 422 U.S. at 762).

Here, as in *Illinois Council*, it is "the 'action'" (namely, the removal) "that must be channeled through the agency" (namely, the MSPB). 529 U.S. at 23; see 5 U.S.C. 7513(d) (authorizing appeal of "[a]n action taken under this section"). And here, as in *Thunder Basin*, any constitutional challenges to that action that the agency does not address could be "meaningfully addressed in the Court of Appeals" in the first instance. 510 U.S. at 215. The CSRA expressly authorizes the Federal Circuit to "hold unlawful and set aside" any agency action found to be "not in accordance with law." 5 U.S.C. 7703(c) and (c)(1). An action taken pursuant to an unconstitutional statute would be an action "not in accordance with law" (namely, constitutional law) and thus within the Federal Circuit's power to address. There is no reason why the Federal Circuit, an Article III court, would be precluded from reaching a constitutional issue simply because the MSPB, an executive agency, was unable to address it in the first instance. Pet. App. 14a (any limitation on the MSPB arises "only because of a doctrine that uniquely applies to administrative agencies and *not* to the Federal Circuit or any other Article III court"). Appellate courts reviewing agency action can, and do, address constitutional claims that an agency cannot or did not decide, including facial challenges to statutes. See, *e.g.*, *Preseault* v. *I.C.C.*, 853

F.2d 145, 148-149 (2d Cir. 1988) (facial challenge to statute), aff'd on other grounds, 494 U.S. 1 (1990); *Plaquemines Port, Harbor, and Terminal Dist.* v. *Federal Mar. Comm'n*, 838 F.2d 536, 544-545 (D.C. Cir. 1988); *Reid* v. *Engen*, 765 F.2d 1457, 1460-1461 (9th Cir. 1985).

Indeed, petitioners themselves cite a case—*Briggs* v. *MSPB*, 331 F.3d 1307 (2003) (cited at Pet. Br. 44)—in which the government acknowledged, and the Federal Circuit accepted, that the Federal Circuit has authority to determine the constitutionality of a federal statute underlying an employee's removal, even when the MSPB itself concludes that it lacks authority to address the constitutional claim. *Id.* at 1310-1318 (considering challenges to the Hatch Political Activity Act). Petitioners cite no court of appeals authority to the contrary. See also Pet. App. 14a ("The Federal Circuit has never said that it was powerless to act where removal occurred and the underlying statute that prompted the removal is itself unconstitutional."). Cases they cite (Pet. Br. 41 n.4) for the proposition that the Federal Circuit's jurisdiction is coextensive with the MSPB's concern jurisdiction over a particular *action*, not jurisdiction over particular *arguments*. See *Perez* v. *MSPB*, 931 F.2d 853, 855 (Fed. Cir. 1991) (MSPB, and therefore Federal Circuit, lacked authority to review certain type of personnel action); *Manning* v. *MSPB*, 742 F.2d 1424, 1426-1427 (Fed. Cir. 1984) (same); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318-1320 (Fed. Cir. 1983) (same); see also *Schmittling* v. *Department of the Army*, 219 F.3d 1332, 1335-1337 (Fed. Cir. 2000) (remanding for MSPB to determine whether agency's action fell within MSPB's appellate jurisdiction); *Billops* v. *Department of the Air Force*, 725 F.2d 1160, 1164 (8th Cir. 1984)

(concluding that Federal Circuit's review authority was limited when petitioner had not followed certain statutory procedures).

3. Petitioners further contend (Pet. Br. 40-53) that initial judicial review of constitutional claims by the Federal Circuit will be impossible in many cases (including theirs), because the Federal Circuit will be reviewing an administrative record that may not contain all of the facts necessary to resolve the constitutional issues. That, however, was equally true of the appellate review available in *Thunder Basin*, and the Court nevertheless held that the constitutional claim at issue could be "meaningfully addressed in the Court of Appeals" even if not addressed by the mine commission. 510 U.S. at 215.

The Federal Circuit's administrative-review posture likewise would not prevent it from meaningfully considering challenges to a statute's constitutionality. As an initial matter, many such challenges—particularly those classifiable as "facial," *e.g.*, Pet. Br. 40—present purely legal issues that do not require a factual record for resolution. This Court generally disfavors facial challenges to statutes precisely because (among other things) they "often rest on speculation" and "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks and citation omitted). Petitioners themselves recognized that their bill-of-attainder claim required no factual development when they sought summary judgment on it before any discovery. Pet. Br. 15, 45. Although petitioners now assert (*id.* at 46) that the district court made a "*factual* conclusion" in their favor, whatever conclusion the district court

reached could not have been one that required evidentiary development. See No. 07-12391 Docket entry No. 18, at 1 (D. Mass. Mar. 3, 2008) (petitioners' representation that "there are no material facts required to be determined" to decide their summary-judgment motion).

In any event, reviewing courts can, and often do, take judicial notice of the sort of facts that are sometimes necessary to resolve constitutional claims. Legal challenges to the constitutionality of a statute, and especially facial challenges, are very unlikely to turn on credibility determinations or other factual determinations uniquely within the capacity of a trial court. Rather, "constitutional facts"—that is, facts that "assist a court in forming a judgment on a question of constitutional law"—often do not "come into a case through the evidence along with adjudicative facts" (facts about the case at hand), but instead "frequently * * * come to the court's attention through researches of a judge or briefs of counsel." Kenneth Culp Davis, *An Approach to Problems of Evidence In the Administrative Process*, 55 Harv. L. Rev. 364, 403 (1942); cf. Fed. R. Evid. 201(a) (imposing limitations only on judicial notice of "adjudicative fact[s]").

In *Muller* v. *Oregon*, 208 U.S. 412 (1908), for example, this Court took note of "over ninety reports" about labor conditions cited in "the brief filed by Mr. Louis D. Brandeis, for the defendant in error" in deciding whether a law limiting women's working hours was constitutional. *Id.* at 419, 420 n.1. The Court continues to this day, even in cases that originated in trial court, to cite articles, studies, amicus briefs, and similar extra-record materials in deciding constitutional questions. See, *e.g.*, *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2736-2737 (2011); *Bullcoming* v. *New Mex-*

ico, 131 S. Ct. 2705, 2711 n.1 (2011); see also, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483, 495 & n.11 (1954). Those are exactly the type of materials petitioners cite in support of their equal-protection argument, see Pet. Br. 47-53, and the Federal Circuit could have taken judicial notice of them. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 72-83 (1981) (relying primarily on congressional hearings in rejecting equal-protection challenge to selective-service system); Pet. Br. 48 n.5 (observing that *Rostker* was litigated on a stipulated record).

Finally, even if some case raising a legal challenge to a statute's constitutionality were to require facts beyond judicial notice, an evidentiary record could be developed before the MSPB. To begin with, nothing prohibits an employee, in his initial appeal to the MSPB, from supplementing the record with materials that are relevant to his constitutional arguments. Indeed, the MSPB's evidentiary rules are looser than a district court's. See, *e.g.*, *Johnson* v. *FEMA*, 41 M.S.P.R. 561, 565 n.5 (1989); *Davies* v. *United States Dep't of Agric.*, 5 M.S.P.R. 253, 254 (1981). And even if the MSPB were initially to exclude the evidence for some reason (although it is unclear what that reason might be), a description of the evidence would still by regulation become part of the administrative record, and the Federal Circuit would thereby be made aware of its existence and what it would prove. 5 C.F.R. 1201.61 ("Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.").

Insofar as the Federal Circuit nevertheless considered the initial record insufficient to permit meaningful consideration of a constitutional claim, it could remand the case to the MSPB for further factual development.

The House and Senate bills that became the CSRA both expressly authorized factfinding remands to the MSPB. See S. Rep. No. 95-969, at 226; H. Rep. No. 1403, 95th Cong., 2d Sess. 311 (1978). Although the final version of Section 7703 omitted any express discussion of remands, the Federal Circuit's authority to remand cases to the MSPB for further legal or factual development (calculation of a backpay award, for example) is inherent in the statute's authorization of "judicial review" of agency action. 5 U.S.C. 7703(a). Congress intended that the CSRA "incorporat[e] the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies." S. Rep. No. 1272, 95th Cong., 2d Sess. 143 (1978); H. Rep. No. 1717, 95th Cong., 2d Sess. 143 (1978); see *Lindahl*, 470 U.S. at 794-797. That mechanism has long included the ability of an appellate court to remand a case to an agency "to permit further evidence to be taken or additional findings to be made upon essential points." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); see also *id.* at 373 n.5 (citing cases). Accordingly, the Federal Circuit has understood itself to have authority to remand cases to the MSPB and to order the MSPB to take additional evidence on certain issues. See, *e.g.*, *Adamsen* v. *Department of Agric.*, 563 F.3d 1326, 1328 (2009); *Williams* v. *OPM*, 162 Fed. Appx. 979, 981-982 (2006); *Madrigal* v. *OPM*, 29 F.3d 644 (1994) (per curiam). That understanding is analogous to the understanding of this Court and other courts that remands to an agency are authorized under the Administrative Procedure Act, which likewise lacks an express remand provision. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419-420 & n.33 (1971) (recognizing remand authority); *Secretary*

of Labor v. *Farino*, 490 F.2d 885, 891-892 (7th Cir. 1971).

A remand for further development of the record is not only the typical course, but also generally the "proper course" in cases where the record is insufficient to allow for meaningful judicial review of agency action. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 745 (1985); see, *e.g.*, *ITT World Commc'ns*, 466 U.S. at 469 ("If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency."); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) ("[A]n appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration."). The MSPB's statutory authority to "administer oaths, examine witnesses, and take evidence," 5 U.S.C. 1204(b)(1), renders it fully capable of supplementing the record in any way that might be necessary. And its regulations specify detailed procedures through which an aggrieved employee may take depositions and other discovery, 5 C.F.R. 1201.71-1201.75, request the MSPB to take "official notice" of undisputed facts, 5 C.F.R. 1201.64, and subpoena testimony or other evidence, 5 C.F.R. 1201.81-1201.83; see *Gilbreath* v. *Guadalupe Hosp. Found., Inc.*, 5 F.3d 785 (5th Cir. 1993) (per curiam) (enforcing third-party subpoenas issued by MSPB administrative judge).

4. Petitioners offer no persuasive reason why the procedures just described would be unavailable or inadequate to resolve their case or any other. They err in citing the Federal Circuit's decision in *Briggs* for the proposition that "the Federal Circuit does not decide an

issue for the first time on appeal when a factual record is necessary to determine the issue but has not been developed below." Pet. Br. 44. *Briggs* holds that the Federal Circuit can consider a constitutional challenge to a statute, even if that challenge was not addressed by the MSPB, when the administrative record is sufficient. F.3d at 1313. Petitioners overlook the primary point of *Briggs* (that the Federal Circuit has recognized its ability to review constitutional challenges in the first instance) in favor of an unsupported negative implication (that the ability to undertake such review when the record is sufficient necessarily implies an inability to do so otherwise). *Briggs* did not even discuss, much less repudiate, the procedures (judicial notice and remand to the MSPB) through which the Federal Circuit might supplement an otherwise insufficient administrative record.

The availability of those procedures also refutes petitioners' suggestion that only a district court has "the authority to develop an evidentiary record" to resolve a federal-employment-related constitutional claim. Pet. Br. 43 (quoting *Illinois Council*, 529 U.S. at 23-24). Indeed, in the very case from which petitioners extract that quote, the district court's review of constitutional claims was constrained by a statute (42 U.S.C. 405(g)) that authorized only appellate-style review of the administrative record. See, *e.g.*, Resp. Br. 26, *Illinois Council*, *supra* (No. 98-1109) (arguing that the limited nature of the district court's review militated in favor of allowing constitutional challenges under 28 U.S.C. 1331 instead). Thus, although the district court would have had some inherent recordmaking authority as a matter of last resort if the agency itself refused to accept necessary evidence, the primary way for the district court to "to develop an evidentiary record," *Illinois Council*, 529

U.S. at 24, assuming one were necessary, would have been by remanding to the agency. See Reply Br. 15-16, *Illinois Council*, *supra* (No. 98-1109).

Remanding to the agency would also necessarily have been the only way for the appellate court to develop any facts necessary to resolve the constitutional claim at issue in *Thunder Basin*. 510 U.S. at 214; see *Illinois Council*, 529 U.S. at 23 (reaffirming *Thunder Basin*). There may, of course, be some statutory schemes in which a court of appeals' ability to supplement the record would be too limited to provide for meaningful judicial review. In *McNary* v. *Haitian Refugee Center*, for example, this Court expressed concerns about a court of appeals' ability to supplement an administrative record when (1) the agency action the court was permitted to review was not even the same agency action that the plaintiffs wanted to challenge (thereby rendering even the adjudicatory facts in the administrative record largely irrelevant), and (2) the statute at issue expressly provided that review would be "based solely upon the administrative record established at the time of the review." 498 U.S. at 486 n.6 (quoting 8 U.S.C. 1160(e)(3)(B)); see *id.* at 497. But here, as in *Thunder Basin*, no such impediments exist. Cf. 510 U.S. at 213 (rejecting an analogy to *Haitian Refugee Center*). The Federal Circuit has direct appellate jurisdiction to review the very agency action (removal) to which the constitutional challenge relates and can augment the record when necessary. Even if remand-facilitated factual development might arguably be less efficient than district-court factual development, such policy arguments provide no basis for concluding that the statutory scheme is altogether inapplicable. *Id.* at 215; *Harrison*, 446 U.S. at 592-594.

B. The Availability Of Judicial Review Under The CSRA Precludes Petitioners From Suing In District Court

Because the CSRA provides an avenue for judicial review of petitioners' constitutional claims (see Part II.A, *supra*), and because Congress intended judicial review under the CSRA to be exclusive (see Part I, *supra*), the court of appeals properly ordered the dismissal of petitioners' suit. To the extent petitioners suggest (Pet. Br. 32-40) that there should be an exception to CSRA exclusivity for "facial constitutional challenges," that suggestion is misplaced.

1. As a threshold matter, petitioners' proposed rule would be amorphous and difficult to administer. This Court has recognized that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United* v. *FEC*, 130 S. Ct. 876, 893 (2010). A court is not bound by a party's characterization of a claim as "facial" or "as-applied," and it may not be clear to a district court at the outset of the case (when it would have to decide a motion to dismiss) what kind of claim it will turn out to be. *Ibid.*

This case illustrates the point. It is at best unclear whether petitioners' claims in this case may properly be characterized as facial. In a facial claim, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Petitioners' claims do not appear to fit that description. Their bill-of-attainder claim alleges that Section 3328 "legislatively imposes punishment—the lifetime bar to federal employment—on a specific group of men for their irreversible failure to register." Pet. Br. 14. Even assuming such a "specific

group of men" existed when the statute was passed in 1985, it is difficult to see how petitioners' bill-of-attainder argument would void application of Section 3328 to someone who was a child when the statute took effect, only later was required to register for the draft, and still later was denied federal employment based on his failure to register. Cf. *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 81-88 (1961) (addressing bill-of-attainder argument as part of an as-applied challenge to a statute).

Petitioners' equal-protection argument likewise appears to relate only to men of certain ages. Petitioners do not directly contest that *Rostker* v. *Goldberg*, which upheld the selective-service system against an equal-protection challenge, was correct when it was decided. They instead contend that "*Rostker* should be revisited in light of the current role of women in the military." See Pet. Br. 47-53. The necessary implication of that argument is that at some point between 1981 (when *Rostker* was decided) and now, circumstances changed so that the draft-registration requirement became unconstitutional. See *id.* at 49-50. Even if correct, that argument would not preclude application of Section 3328 to someone who was required to, but did not, register for the draft around the time *Rostker* was decided (and who would now be in his late 40s to mid-50s).

In order to encompass their own claims, therefore, petitioners' proposed exception to CSRA exclusivity would seem to depend not on whether a claim is "facial" or "as-applied," but instead on some even more ill-defined set of criteria. Petitioners' proposal would thus invite litigation in nearly every case over whether a particular rule is sufficiently "collateral" (*e.g.*, Pet. Br. 37) to the CSRA's review scheme to permit suit in district

court. Such litigation would be wasteful, likely to generate inconsistent decisions by different courts, and highly dependent on how creatively an employee can frame his complaint. Cf. *General Servs. Admin.*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

The wastefulness problem would be magnified by the practical necessity, in most if not all cases, for an employee filing in district court nonetheless to pursue his CSRA remedy at the same time. An employee who fails to do so runs the serious risk that the district court or court of appeals will order his suit dismissed on CSRA-exclusivity grounds after his time for proceeding under the CSRA has already expired. See 5 C.F.R. 1201.22(b)(1) (general 30-day time limit for MSPB appeal); 5 U.S.C. 7703(b)(1) (60-day time limit for petition for review of MSPB decision by Federal Circuit).

2. Congress is highly unlikely to have intended such an impractical result, and petitioners' argument finds no support in this Court's precedents. Although the Court has sometimes determined that a particular claim falls outside an otherwise-exclusive statutory scheme, see *Thunder Basin*, 510 U.S. at 212-213 (citing cases), it has not done so when the scheme itself provides an adequate and immediately-available alternative path for judicial review of the challenged agency action. Rather, the Court has said that it will "presume that Congress does not intend to limit jurisdiction" over particular claims if "'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund* v. *Public Co.*

Accounting Oversight Bd., 130 S. Ct. 3139, 3150 (2010) (quoting *Thunder Basin*, 510 U.S. at 212-213). None of those factors, let alone all three of them, apply here.

First, the CSRA's channel to the Federal Circuit does not "foreclose all meaningful judicial review"—it *provides* judicial review. Employees in petitioners' position may start down a path to judicial review immediately after their adverse action becomes final. See pp. 3-5, *supra*. In contrast, the plaintiffs in the cases on which petitioners primarily rely (Pet. Br. 37-38) needed to be able to challenge agency action in district court in order to be assured of meaningful review. See *Haitian Refugee Ctr.*, 498 U.S. at 484, 496-499 (foreclosing district-court suit would effectively have denied meaningful judicial review); *Robison*, 415 U.S. at 364-365 (same); *Mathews* v. *Eldridge*, 424 U.S. 319, 331 (1984) (plaintiff had "colorable claim" that postponing judicial review would deny him full relief); see also *Free Enter. Fund*, 130 S. Ct. 3150-3151 (existing review mechanism did not fit the plaintiff's situation); *Thunder Basin*, 510 U.S. at 212-214 (discussing cases cited by petitioners).

Second, a claim, including a constitutional claim, made for the purpose of setting aside an employee's removal is not "wholly collateral" to "review provisions" designed for the exact purpose of providing employees with a remedy for wrongful removals. Petitioners' assertion that constitutional arguments like theirs "are entirely collateral to the purpose and structure of the CSRA," Pet. Br. 38 (internal quotation marks omitted), repeats their mistake of treating the CSRA's review scheme as though it covers only particular types of arguments. Just because it is theoretically possible for arguments like petitioners' to be made outside the context of a federal-employment dispute, see, *e.g.*, *id.* at 39

n.3, that does not make those arguments "wholly collateral" to the CSRA when, as in this case, they are made for the purpose of challenging an employment action at the core of what the CSRA covers. As explained above, the CSRA's plain language covers all challenges to particular types of agency actions (including the removals at issue here); the CSRA does not distinguish between the arguments an employee might make in pursuing such a challenge; and full relief is available for an employee who prevails. See pp. 3-5, 32-35, *supra*.

This Court has previously recognized that a suit seeking the same sort of relief already available under a specialized statutory scheme should not be considered "wholly collateral" to that scheme. In *Heckler* v. *Ringer*, the Court held that a district court lacked jurisdiction over a challenge to an agency's policy of refusing Medicare reimbursement for a particular form of surgery, because the plaintiffs were required to follow the special statutory scheme for administrative and judicial review of Medicare benefits claims. 466 U.S. at 605-611, 617. The Court refused to excuse the plaintiffs from exhausting their administrative remedies under that scheme, expressly rejecting the contention that their challenge to the agency's policy was "'wholly collateral' to their claim for benefits." *Id.* at 618 (distinguishing *Eldridge*, 424 U.S. at 330-332). The Court acknowledged that the plaintiffs arguably asserted "procedural" objections to the manner in which the agency had promulgated its policy. *Id.* at 614. But it concluded that, "at bottom," their suit amounted to a claim for benefits, and thus sought a remedy exclusively available only under the specific review scheme that Congress had provided. *Ibid.*; see also *Haitian Refugee Ctr.*, 498 U.S. at 494-495 (discussing *Ringer*).

Petitioners here, like the plaintiffs in *Ringer*, seek essentially the same remedy ("reinstatement * * * with full back pay and benefits," J.A. 30) that a special statutory scheme (the CSRA) is set up to provide. Thus, as in *Ringer*, petitioners' claim cannot be considered "wholly collateral" to Congress's particularized scheme for providing that remedy, and petitioners should not be excused from availing themselves of that scheme.

Third, petitioners are mistaken in suggesting (Pet. Br. 33-36) that the MSPB lacks any relevant expertise, and the CSRA's procedures thus serve no purpose, in cases where an employee challenges a statute's constitutionality. To begin with, challenges to the constitutionality of a statute governing particular agency action, like other types of constitutional claims, are often raised in conjunction with nonconstitutional arguments challenging the same action. See Pet. App. 12a. As previously discussed (see pp. 28-29, *supra*), strong practical considerations favor keeping all of an employee's claims together. An MSPB decision in the employee's favor on nonconstitutional grounds will moot the constitutional question; the MSPB's determination of factual issues can help to inform later judicial review of the constitutional question; the MSPB's interpretation of the statute or applicable regulations can perform the same function; and splitting an employee's challenge to a single agency action (his removal) between two different forums would both undermine the CSRA's "integrated scheme of administrative and judicial review," *Fausto*, 484 U.S. at 445, and create considerable practical problems.

Congress's systemic interest in channeling employment-related claims through the CSRA does not disappear simply because a particular employee chooses to forgo any nonconstitutional claims and to rely solely

on challenging a statute's constitutionality. Petitioner Tucker's claim provides an example. Tucker was not formally removed by his employing agency, but instead resigned while his case was pending with OPM. J.A. 17; Pet. App. 3a. He alleges that he resigned out of fear of being removed pursuant to Section 3328, and that the circumstances amount to a constructive discharge. J.A. 17; Pet. App. 3a. If, however, he is found not to have been constructively removed, but instead to have left preemptively or for unrelated reasons, he would lack standing to seek reinstatement in any court on any ground (because there would be no agency action to challenge). And the factual question whether the circumstances of his resignation truly amount to a constructive discharge lies squarely within the specialized expertise of the MSPB and the Federal Circuit, which regularly address constructive-discharge issues in the context of federal employment. See, *e.g.*, *Carrow* v. *MSPB*, 626 F.3d 1348, 1352-1353 (Fed. Cir. 2010) (citing cases).

Furthermore, even when there are no such adjudicatory factual questions to resolve, it still makes little sense to undermine "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review," *Fausto*, 484 U.S. at 449, by carving out a particular class of claims—those challenging a statute's constitutionality—to be heard instead by district courts and (on appeal) the regional circuits. The Federal Circuit's expertise in interpreting relevant statutes (and in adjudicating other kinds of constitutional claims) would be valuable in resolving constitutional challenges to those statutes. That is particularly so in cases where the constitutional question could be avoided through statutory construction. See *New York* v. *United States*, 505 U.S.

144, 170 (1992) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statue to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citation omitted). Indeed, allowing different kinds of claims in different courts could lead to impractical circuit conflicts: a regional circuit could interpret a statute one way to avoid a constitutional challenge, while the Federal Circuit (which may not have addressed the constitutional challenge) could interpret the statute a different way in the mine-run of cases.

Congress channeled review to the Federal Circuit precisely to avoid such conflicts. The original 1978 version of the CSRA provided for appellate review of MSPB decisions by the Court of Claims and the regional circuits. 92 Stat. 1143-1144. In 1982, recognizing the "'special need for nationwide uniformity' in certain areas of the law," Congress created the Federal Circuit "to provide 'a prompt, definitive answer to legal questions' in these areas." *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981)). Employment-related claims like petitioners' were one of those areas, and the statute creating the Federal Circuit accordingly amended the CSRA to give the Federal Circuit "exclusive" judicial-review authority in such cases. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 144, 96 Stat. 37-38, 45 (enacting 28 U.S.C. 1295(a)(9) and amending 5 U.S.C. 7703).

This case itself well illustrates the problems of sidestepping that statutory directive. Key portions of petitioners' argument rest on assertions about what the MSPB and Federal Circuit can and cannot do (see Pet. Br. 33-44)—questions that would best be answered, and

that Congress wanted to be answered, by the Federal Circuit in the first instance. For example, this case has been litigated on the premise that the MSPB lacks authority to resolve petitioners' constitutional claims. Although the government agrees with that premise, we are aware of no Federal Circuit decision that has expressly so held, and there is thus a possibility that the Federal Circuit might take a contrary view. See *Thunder Basin*, 510 U.S. at 215 (recognizing that agencies may sometimes be able to adjudicate challenges to a statute's constitutionality).

Finally, it is difficult to conclude that Congress intended to allow claims like petitioners' in district court when it did not even provide a cause of action for such claims. As previously discussed, see pp. 31-32, *supra*, the Administrative Procedure Act does not authorize district-court suits in circumstances where a specialized statutory judicial-review scheme is already available. Rather than taking the considerable step of inferring a cause of action directly under the Constitution, and thereby inviting the various practical problems just discussed, the far more sensible course, and the course that Congress intended, is that employees like petitioners exclusively utilize their existing remedy under the CSRA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 3328 provides:

Selective Service registration

(a) An individual—

(1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C. App. 453); and

(2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual,

shall be ineligible for appointment to a position in an Executive agency.

(b) The Office of Personnel Management, in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. Such regulations shall include provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful. Such procedures shall require that such a determination may not be made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful. Such procedures may provide that determinations of eligibility under the requirements of this section shall be adjudicated by the Executive agency making the appointment for which the eligibility is determined.

2. 5 U.S.C. 7511 provides:

Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign

Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excep-

ted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

3. 5 U.S.C. 7512 provides:

Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

4. 5 U.S.C. 7513 provides:

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. 5 U.S.C. 7701 provides:

Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law

judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that

payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the

Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

6. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after

the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such

petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

7. 50 U.S.C. App. 453 provides:

Registration

(a) Except as otherwise provided in this title [sections 451 to 471a of this Appendix] it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

(b) Regulations prescribed pursuant to subsection (a) may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.

REPLY BRIEF

RECORD AND BRIEFS

FEB [illegible] 2012

No. 11-45

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,
Petitioners.

v.

DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners brought facial constitutional challenges to two federal statutes, both unrelated to the Civil Service Reform Act, and one unrelated to federal employment altogether. The district court has authority to review equitable constitutional claims, and, as the Government correctly concedes, no language in the Civil Service Reform Act takes it away.

Nevertheless, the Government insists that because Petitioners happen to be challenging the statutes in response to termination of their federal employment, Congress impliedly intended that their claims bounce between one tribunal that lacks power to provide the relief Petitioners seek and another that lacks ability to develop a relevant factual record. The impracticality of the Government's proposed procedure illustrates that Congress did not intend, and could not have intended, that result. Rather, as this Court has held in similar cases, constitutional claims that are "wholly collateral" to an administrative review scheme belong in district court.

I. District Courts Are Authorized to Review Petitioners' Equitable Constitutional Claims.

It is well established that district courts have the authority to review equitable constitutional claims. *See* 28 U.S.C. § 1331; Pet. Br. 20-25. Because nothing in the Civil Service Reform Act (CSRA) removes this authority, Petitioners may bring their claims in district court on that basis alone. Pet. Br. 26-32; *see Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.) ("The power of the federal courts to grant equitable relief for constitutional violations

has long been established."); *Hubbard v. U.S. Envtl. Prot. Agency, Adm'r*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986).

Nevertheless, the Government asserts, citing *Bush v. Lucas*, 462 U.S. 367 (1983), that Petitioners lack a right of action. Resp. Br. 31-32. But *Bush* foreclosed only a legal action for *damages*, and Petitioners do not seek damages. Petitioners bring equitable constitutional claims, which can be decided in the district court absent a statute explicitly conferring a right of action and absent the implication of a new judicial remedy. *See* Pet. Br. 23-24.

The Government also suggests that the Petitioners are barred from bringing their claims under the Administrative Procedure Act (APA) because the CSRA provides an "adequate remedy" within the meaning of 5 U.S.C. § 704. Resp. Br. 31-32; *see* Joint Appendix (JA) 6, Complaint ¶ 5. But this assumes the conclusion that the CSRA provides an adequate remedy. For the reasons discussed below, the CSRA does not provide such a remedy, and so Petitioners may proceed in the district court under the APA, as well as directly under the Constitution. Moreover, Petitioners may also bring their claim for a declaration that the statutes are unconstitutional in the district court under the Declaratory Judgment Act, 28 U.S.C. § 2201 (entitled "Creation of remedy"). *See* JA 6.

II. Congress Did Not Intend to Preclude District-Court Review of Petitioners' Constitutional Claims in Favor of the Byzantine and Inefficient Framework Urged by the Government.

As Petitioners have explained, Pet. Br. 26-29, preclusion of district-court review of Petitioners' constitutional challenges requires a heightened showing of congressional intent. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). The Government concedes that the CSRA does not meet this heightened standard but argues that it does not apply here because Petitioners could obtain judicial review under the CSRA in the Federal Circuit. Resp. Br. 18. However, even if *Webster*'s heightened standard does not apply, the Government still must show that Congress's intent to preclude district-court review of facial constitutional challenges is "'fairly discernible' in the detail of the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)); *see* Pet. Br. 33. To be sure, the CSRA "prescribes in great detail the protections and remedies applicable to" adverse personnel actions and creates the Merit Systems Protection Board (MSPB) to adjudicate cases implicating those "protections and remedies" and, thus, precludes district-court review in some cases. *United States v. Fausto*, 484 U.S. 439, 443, 455 (1988).

But Petitioners are not seeking the CSRA's "protections and remedies." Instead, they bring facial constitutional challenges to two federal statutes unrelated to the CSRA. Congress cannot have

intended the MSPB to hear these claims because, as the Government concedes, the MSPB lacks the authority to declare a statute unconstitutional. Resp. Br. 54.[1]

According to the Government, Congress intended Petitioners to appeal a jurisdictional dismissal by the MSPB to the Federal Circuit, which would then remand the case to the MSPB for factual development before a second MSPB dismissal and appeal. *Id.* at 36, 39-45. This Rube Goldberg scheme of administrative and judicial review defies logic and is certainly not "fairly discernible" in Congress's handiwork. No rational Congress would have intended to preclude district-court review in favor of a forum that cannot decide the constitutional questions and establish a procedural framework that would require two dismissals by the MSPB and two appeals to the Federal Circuit before any decision on the merits. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150 (2010) (rejecting the Government's proposed "odd

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[1] The Government questions whether Petitioners' challenge is facial. Resp. Br. 15. Petitioners' claims are facial because Petitioners maintain that 50 U.S.C. app. § 453(a) is unconstitutional as to all men who must register with the Selective Service and that 5 U.S.C. § 3328 is a bill of attainder as to men older than 25 who failed to register. The distinction between as-applied and facial challenges is sometimes difficult to draw, but resolution of this case does not demand that the distinction be drawn. Here, the significance of the "facial" label is that Petitioners seek a declaration that two federal statutes are unconstitutional, and, as the Government concedes, the MSPB is powerless to accord the requested relief.

procedure" for administrative review of constitutional claims in favor of district-court jurisdiction).

A. The Government cites *Briggs v. Merit Systems Protection Board*, 331 F.3d 1307 (Fed. Cir. 2003), for the proposition that the Federal Circuit will hear claims like Petitioners' even when the MSPB cannot decide them. Resp. Br. 44. But unlike in *Briggs*, a factual record is necessary to decide Petitioners' constitutional claims. *See Briggs*, 331 F.3d at 1312-13 (citing the lack of need for a factual record as a factor in deciding to review the constitutional claim for the first time on appeal); Pet. Br. 44-53.[2]

Because the MSPB lacks authority to decide Petitioners' constitutional claims, any MSPB record would contain facts bearing on the MSPB's jurisdictional dismissal but no evidence bearing on the constitutional claims. When Petitioner Elgin appealed to the MSPB, the resulting administrative record contained only his personal information, details of his employment, and the Office of Personnel Management's (OPM's) determination that he had knowingly and willfully failed to register with the Selective Service. First Cir. Br. for Defs.-Appellees 26-27. None of this evidence has anything to do with Petitioners' bill of attainder or equal protection claims. In the administrative-exhaustion context, when there is "complete divergence"

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[2] As explained previously, in general, the Federal Circuit adheres to standard appellate practice, holding that its jurisdiction is coextensive with the jurisdiction of the lower tribunal under review. Pet. Br. 41 & n.4 (citing cases).

between the factual issues presented by a constitutional claim and the claims that an agency ordinarily hears, the exhaustion requirement is excused, and plaintiffs may proceed directly to district court. *Andrade v. Lauer*, 729 F.2d 1475, 1492 (D.C. Cir. 1984). Similarly, the complete divergence between the facts necessary to Petitioners' constitutional claims and the facts in Petitioner Elgin's MSPB record demonstrates that Congress did not intend to shoehorn claims like Petitioners' into the CSRA review scheme.

The insufficiency of an MSPB record would affect both the employee and the Government on appeal to the Federal Circuit. Petitioners have consistently contended that their equal protection claim will require extensive factual development. Pet. Br. 47-53. The Government says that the same is not true of Petitioners' bill of attainder claim. Resp. Br. 39-40. But the Government's own conduct demonstrates otherwise. The Government submitted evidence about OPM's practices that assisted the district court in finding for it on the bill of attainder claim. *See* Dist. Ct. Doc. 53, at 13 & n.9. That evidence was not in the MSPB record and would have been unavailable to the Federal Circuit on appeal. By contrast, a district court would compile a record that included such evidence. *Cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) ("[S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative

record . . . .'" (quoting Br. for Am. Bar Ass'n at 7)).

B. The Government claims that "many [facial] challenges . . . do not require a factual record." Resp. Br. 39. But that is not this case. At a minimum, a factual record is required for Petitioners to prevail on their equal protection claim. Pet. Br. 47-53. Moreover, Petitioners' claims are hardly unique. Courts often require a factual record to resolve constitutional challenges. In *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 667-68 (1994) (plurality opinion), for example, this Court vacated a grant of summary judgment on a facial challenge under the First Amendment because the Government presented a "paucity of evidence" regarding whether the law was narrowly tailored. *See also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (describing agency's objection to expedited decision on facial challenge as based on agency's asserted need for "extensive discovery"). Indeed, the equal protection decision that Petitioners seek to revisit involved a facial challenge with a five-volume record. *Goldberg v. Rostker*, 509 F. Supp. 586, 588 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981). The kind of well-developed record on which the judges and Justices relied in *Rostker* would not be available to the Federal Circuit under the Government's scheme because the MSPB would have dismissed the claim without the production of any record, let alone discovery.[3]

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[3] Facial challenges to statutes frequently demand creation of a factual record. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 192, 195 n.12, 202-03 (2008) (plurality opinion); (cont.)

The Government next argues that, if a factual record were necessary, the Federal Circuit could use judicial notice to create a record, noting that the parties in *Rostker* stipulated to the record and that *Rostker* was decided, in this Court, on the basis of congressional testimony. Resp. Br. 40-41.

But the Government's reference to a stipulated record in *Rostker* is misleading. The stipulation did not replace discovery but rather represented an agreement to forgo an evidentiary hearing after extensive discovery. *See Goldberg*, 509 F. Supp. at 588 n.3. The five-volume record to which the parties stipulated included depositions of government officials. *See id.* at 599-602 nn.17-20, 24-26. Because the Federal Circuit cannot order or oversee discovery, the parties would not have the same opportunity to develop the record under the Government's framework. And, as demonstrated by the Government's refusal to produce documents without a discovery request in this case, it is unlikely

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Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625-28 (1995); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677-78 (1989); *Toomer v. Witsell*, 334 U.S. 385, 397-99 & nn.28, 30 (1948); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 240, 257 (4th Cir. 2010); *Hutchins v. District of Columbia*, 188 F.3d 531, 541-42 (D.C. Cir. 1999); *Kalman v. Cortes*, 723 F. Supp. 2d 766, 790-91, 795-96 (E.D. Pa. 2010); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-73 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, ___ F.3d ___, 2012 WL 372713 (9th Cir. Feb. 7, 2012); *Gen. Elec. Co. v. Whitman*, 257 F. Supp. 2d 8, 25 n.9 (D.D.C. 2003), *rev'd sub nom. Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188 (D.C. Cir. 2004); *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 206-07 (D.D.C.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

that the Government would permit *Rostker*-like depositions and other discovery absent a court order. JA 42-43. Without this evidence, there would be no record to which to stipulate.

The claim that this Court's decision in *Rostker* turned on congressional hearings, of which the Federal Circuit might take judicial notice, is also misleading. *See* Resp. Br. 41. First, there is no guarantee that the same wealth of contemporaneous congressional testimony would be available to the Court in this or another similar case. Second, even in *Rostker*, judges and Justices went beyond publicly available materials. Justices White and Marshall both cited deposition testimony from the record. *Rostker v. Goldberg*, 453 U.S. 57, 84 (1981) (White, J., dissenting); *id.* at 108, 111 (Marshall, J., dissenting). And the trial court denied the Government's early motion for summary judgment because it "needed an amplification of the record before [it] could decide the [claims]." *Goldberg*, 509 F. Supp. at 589 n.5; *see id.* at 599-602 nn.17-20, 24-26 (citing depositions). It is true, as the Government contends, Resp. Br. 41, that Petitioners cited many publicly available materials in their opening brief. But that is because discovery has not yet been taken, and Petitioners lack the more compelling evidence that could be obtained in discovery.[4]

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[4] The Government says that "nothing prohibits an employee, in his initial appeal to the MSPB, from supplementing the record with materials that are relevant to his constitutional arguments." Resp. Br. 41. But something *does* prohibit the employee from doing so in a case like Petitioners': the MSPB's (cont.)

C. The Government's suggestion that the Federal Circuit could remand the case back to the MSPB to address an insufficient record would be an abnormal use of remand, cannot be defended by appeals to agency expertise, and raises concerns about who would serve as factfinder.

First, the cases cited by the Government for the proposition that the Federal Circuit could remand to the MSPB for additional record development all involved remand to an agency that indisputably had authority to decide the claim on its merits. *See* Resp. Br. 42-43 (citing cases). But here, the MSPB could not have decided the merits of Petitioners' claims even on remand, and the Government does not contend otherwise. Ordinarily, a tribunal that lacks the authority to decide the merits would also lack the authority to do anything else—including oversight of factual development. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In deciding this case, this Court could take the unprecedented step of imbuing the MSPB with that authority, but positing that outcome only underscores the peculiarity of the Government's proposed scheme.

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immediate dismissal because it lacks authority to grant the requested relief. And the MSPB regulation the Government cites allowing the proffer of evidence excluded at a hearing, *see id.*, presumes that the MSPB actually holds a hearing, something it does not do when it lacks jurisdiction—and, therefore, did not do in Petitioner Elgin's case. Pet. App. 95a n.1. More importantly, even if Petitioners could have lodged evidence with the MSPB, they could not have taken discovery.

Second, remand makes sense when the agency is expert in the case's subject matter or possesses evidence important to the record. *See, e.g., Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). But the MSPB's expertise lies in federal employment and manager-employee disputes. Pet. Br. 8-9. It is not expert on questions of constitutional interpretation (and certainly not on the constitutional issues posed by Petitioners' "wholly collateral" claims, *see infra* 17-20). The MSPB may have discovery powers similar to those of a district court, *see* Resp. Br. 43, but there is no reason to prefer remand to the MSPB over district-court adjudication on the basis of the MSPB's subject-matter expertise or possession of pertinent evidence.

Finally, the Government fails to identify who within its conjured framework would serve as factfinder. It asserts that the Federal Circuit should remand the case and that the MSPB should oversee discovery and compile a record. Resp. Br. 41-43. What is not clear from the Government's brief is what would happen next. Would the MSPB make factual findings even though it cannot render legal conclusions or order the relief requested? Some questions that Petitioners raise—such as whether men and women are sufficiently similarly situated with regard to military service—are mixed questions of law and fact. They would require the MSPB to draw a narrow line at where its authority to find facts ends and where its inability to make legal conclusions on the constitutionality of statutes begins. *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 491-92 (1979) (Rehnquist, J., dissenting)

(discussing complexities of mixed questions of law and fact in equal protection cases). On the other hand, if the MSPB lacks authority to find facts where it is powerless to render a decision, the Federal Circuit would be forced into a fact-finding role that appellate courts almost invariably eschew. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982). To be sure, this Court could require the Federal Circuit to find facts in the first instance. But the Government's failure to propose an answer highlights the problems inherent in either solution and exposes the oddity of requiring Petitioners to proceed in the MSPB and the Federal Circuit. By contrast, district-court consideration of claims like Petitioners' does not raise these concerns, as the district court would find facts and make conclusions of law, and the circuit court would assume its ordinary appellate role.

D. It is possible, though not sensible, that Congress might have devised the scheme the Government describes. But the question here is whether the CSRA *implicitly* does so. Given that the CSRA does not expressly adopt the Government's scheme, any intent must be inferred—and be fairly discernible—from the CSRA's text. *See Block*, 467 U.S. at 351. The complexities of the Government's hypothetical framework demonstrate that Congress did not intend that Petitioners' constitutional challenges would be subject to that framework.

Indeed, the procedures imagined by the Government would actually undermine the benefits of the preclusion scheme that the Government invokes. "[C]hanneling constitutional claims through

an agency," the Government says, "has the benefits of (1) promoting judicial efficiency . . . ; (2) allowing the agency to bring its expertise to bear on the constitutional issues; and (3) providing the agency an opportunity to 'produce a useful record for subsequent judicial consideration.'" Resp. Br. 28-29 (citations omitted) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). The Government's scheme frustrates each of these purposes.

First, the Government's framework undermines judicial efficiency by requiring employees, government attorneys, the MSPB, and the Federal Circuit to engage in perfunctory litigation procedures that all parties involved know cannot result in a decision on the merits. Employees must file and the Government must oppose a claim at the MSPB that all know must be dismissed. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978) (per curiam). The Federal Circuit must then entertain an appeal that it and both parties know cannot be decided on the current record. Then, the Federal Circuit must remand the case to the MSPB, which the Federal Circuit knows cannot decide the merits. Finally, as noted earlier (at 10-12), the MSPB must oversee discovery in a case that it knows it lacks authority to decide. Only then, after the MSPB dismisses and the plaintiff appeals to the Federal Circuit for a second time, would there be a decision on the merits.

Second, as noted above (at 11), the MSPB lacks expertise that bears on Petitioners' facial constitutional challenges; rather, it adjudicates "disputes between agency managers and their

employees." S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2727. The Government nevertheless endorses channeling so the MSPB can "weigh in on any statutory, regulatory, or factual issues as to which [its] expertise may be helpful." Resp. Br. 13. Petitioners do not contend that their employment record played any role in their terminations; they do not contend that their terminations were contrary to statute or regulation; and they do not contend that any agency misinterpreted any statute. (The Government contends none of these things either.) *See Free Enter. Fund*, 130 S. Ct. at 3150 ("[W]e presume that Congress does not intend to limit [district court] jurisdiction . . . if the claims are 'outside the agency's expertise.'" (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994))).[5]

The case is nearly bereft of facts related to Petitioners' employment. The only possible factual question the MSPB could consider with regard to Petitioners' claims would be whether Petitioner Tucker was constructively removed. *See* Resp. Br. 15. But the MSPB would dismiss Tucker's constitutional claim immediately, as it did Petitioner Elgin's, without deciding this factual question, because it cannot grant the relief requested.

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[5] The Government also invokes the expertise of the Federal Circuit but never explains why the Federal Circuit is more expert than other courts of appeals in deciding whether Selective Service statutes are unconstitutional. *See* Resp. Br. 52. This is not, after all, a patent appeal. *See* 28 U.S.C. § 1295(a)(1), (4).

Third, the Government's framework does not provide "an opportunity to produce a useful record." Resp. Br. 29 (quoting *McCarthy*, 503 U.S. at 145) (internal quotation marks omitted). As explained above (at 5-7), because the MSPB cannot decide Petitioners' constitutional claims, the MSPB record cannot—and did not in Petitioner Elgin's case—contain information relevant to those claims.

E. The CSRA provides some employees with greater protections and remedies than others; not all federal employees may appeal adverse employment actions to the MSPB. *See* 5 U.S.C. § 7511(a)(1), (b) (listing which employees are protected by the merit system and which are excluded); 5 U.S.C. § 7513(a), (d) (describing protections and MSPB appeal rights). The Government's framework would lead to the bizarre result that employees who may not bring claims in the MSPB under the CSRA would have more robust judicial review of constitutional claims than employees who may bring such claims. In *Fausto*, this Court held that the plaintiff, an employee without MSPB appeal rights, could not bring a Back Pay Act claim in the Court of Federal Claims. 484 U.S. at 451. The Court explained that Congress intended the CSRA to preclude judicial review of nonconstitutional monetary claims, even for employees who could not bring claims in the MSPB. *Id.*[6]

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[6] At the time *Fausto* was decided, excepted-service employees like Fausto could not appeal employment actions to the MSPB. *See* 484 U.S. at 448. Congress has since granted many excepted-service employees MSPB appeal rights, *see* 5 U.S.C. (cont.)

But the CSRA would not have prevented Fausto from bringing *constitutional* claims in the district court, including, if he had been terminated for failing to register with the Selective Service, claims identical to Petitioners'. As the Government concedes, Resp. Br. 18, the CSRA does not meet *Webster*'s heightened-showing requirement and so, unless he had access to district court, Fausto would have been impermissibly "den[ied] any judicial forum." *Webster*, 486 U.S. at 603.

The Government's proposed procedure turns *Fausto* on its head, imposing the very "inverted preference" that *Fausto* rejects. 484 U.S. at 450. The supposedly disfavored employees without MSPB appeal rights could obtain more meaningful judicial review of constitutional challenges—that is, an extra layer of review and more immediate access to a tribunal with the authority to decide the claim—than the supposedly favored employees. This discussion of federal employees who do not have access to MSPB review is hardly academic: According to the MSPB, only "about two-thirds of the full-time civilian work force[] currently have appeal rights to the Board." Jurisdiction, U.S. Merit Sys. Protection Bd., http://www.mspb.gov/About/jurisdiction.htm (last visited Feb. 14, 2011).

In sum, the Government's framework runs headlong into the principles that underlie the CSRA, the justifications for channeling claims to agencies,

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§ 7511(a)(1)(C), but, as explained in the text, many other federal employees may not proceed in the MSPB.

the standard progression from trial to appellate courts, and those courts' respective roles.

III. The CSRA Does Not Impliedly Preclude District-Court Authority to Hear Petitioners' Claims Because They Are Wholly Collateral to the CSRA's Review Scheme.

Even if it were fairly discernible that Congress intended the CSRA to impliedly preclude some constitutional suits, that intent would not extend to constitutional claims unrelated to the subject matter of the CSRA's review scheme. The Government says that the CSRA requires Petitioners' claims to be brought to the MSPB because Petitioners were federal employees. But, as our opening brief explains (at 36-40), Petitioners' challenge is "wholly collateral" to the CSRA. *See Thunder Basin*, 510 U.S. at 212 (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)) (internal quotation marks omitted).

A. The Government argues that the claims are not collateral because one of the remedies that Petitioners seek—reinstatement—is "essentially the same" as a remedy the CSRA provides. Resp. Br. 51. However, whether a claim is "wholly collateral" to a review scheme does not depend on the relief sought.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the plaintiff brought a constitutional challenge to an administrative review scheme and requested reinstatement of his social security benefits—exactly the remedy the administrative scheme provided. *Id.* at 324-25. Nevertheless, this Court held that his due process claim was "collateral" to his claim for

benefits and, therefore, he could bring his claim in district court. *Id.* at 330-32.

Similarly, in *Johnson v. Robison*, 415 U.S. 361 (1974), the plaintiff sought both a declaration that the statute denying him veterans' benefits was unconstitutional and a declaration that he was entitled to those benefits. *Robison v. Johnson*, 352 F. Supp. 848, 850 (D. Mass. 1973), *rev'd*, 415 U.S. 361. Entitlement to benefits was what the veterans' benefits administrative scheme regularly adjudicated. However, this Court held that the plaintiff's constitutional claim was unrelated to the administrative scheme and permitted suit in district court. *Johnson*, 415 U.S. at 373.

The Government's argument is also wrong on its own terms. Yes, the MSPB can order reinstatement in the run-of-the-mill case. But the MSPB *could not* do so here because it could not render the predicate declaration on which reinstatement hinges: that 5 U.S.C. § 3328 and 50 U.S.C. app. § 453(a) are unconstitutional.

Petitioners' constitutional claims are far removed from the types of employee-manager disputes the CSRA is designed to address. Indeed, they are more removed than were the claims held collateral in *Mathews*, 424 U.S. at 330, and *McNary*, 498 U.S. at 498-99. Both were challenges to the very administrative schemes the Government argued precluded district-court review. Petitioners' claims, by comparison, are *doubly* collateral: They present neither a claim that can be adjudicated by the review scheme nor a challenge to the review scheme itself. Rather, Petitioners challenge elements of the

Selective Service system—which has nothing to do with adjudication of federal employee-manager disputes. If Petitioners' claims are not collateral to the statutory scheme, it is hard to imagine a claim that would be.[7]

B. The Government argues that Petitioners' claims are not collateral because they are more like the claims in *Thunder Basin*, where this Court held that the plaintiff's claims were precluded, than the claims in *Mathews* and *McNary*. *See, e.g.*, Resp. Br. 25, 29-30, 36. In *Thunder Basin*, a mine operator believed a union had violated federal labor law and argued that mandatory administrative review procedures of the Federal Mine Safety and Health Amendments Act (Mine Act) violated its due process rights. 510 U.S. at 204-05. This Court held that district-court review of the plaintiff's pre-enforcement statutory and constitutional claims was precluded by the Mine Act. *Id.* at 215-16.

The Government argues that the CSRA and the Mine Act are "quite similar" because both provide for administrative-agency adjudication followed by court-of-appeals review. Resp. Br. 25. But whether a claim is collateral depends on more than the nature of the administrative scheme; it depends on how

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[7] The collateral nature of Petitioners' claims is highlighted by the fact that if Petitioners sought a declaration that they were eligible to work for the federal government in the future, no one would dispute that the district court would have authority to hear those claims. Yet aside from Petitioners' request for reinstatement, that case would be identical to the one now before this Court. *See also* Pet. Br. 39 n.3.

removed the constitutional claims are from the types of claims the agency typically adjudicates and in which the agency has expertise. Viewed from this perspective, the Government's comparisons to *Thunder Basin* are inapposite.

In *Free Enterprise Fund*, this Court explained that, "[i]n *Thunder Basin*, the petitioner's primary claims were statutory" and benefitted from the agency's expertise. 130 S. Ct. at 3151. Here, like the plaintiffs in *Free Enterprise Fund*—and unlike the plaintiff in *Thunder Basin*—Petitioners have no statutory claims, and, as explained (at 11), their constitutional claims are unrelated to the agency's expertise. Though the administrative scheme in *Free Enterprise Fund* also provided for review of agency decisions in a court of appeals, this Court held that the plaintiffs were not required to shoehorn their constitutional challenge into the "odd procedure[s]" proposed by the Government because their constitutional claim was wholly collateral to the review scheme and outside the agency's expertise. *Id.* at 3150-51.

The Government is right that "this is an easier case than *Thunder Basin*," Resp. Br. 25, but not in the direction it argues. As explained above, Petitioners are more entitled to district-court review than the plaintiff in *Thunder Basin* and, indeed, in any of the cases in the "wholly collateral" line of authority.

IV. District-Court Review of Equitable Constitutional Claims Would Not Impose a New Burden on the Judiciary.

The Government expresses concern at leaving courts and the MSPB with concurrent jurisdiction over constitutional claims brought by federal employees. The Government argues that if Petitioners' claims are not precluded, future plaintiffs with equitable constitutional claims will file duplicative suits in the MSPB and district court seeking relief on the same underlying facts. Resp. Br. 28-29, 51. The Government is wrong.

First, the Government contends that constitutional challenges to statutes are "often raised in conjunction with nonconstitutional arguments," raising the specter of a flood of litigation. Resp. Br. 51. However, the Government cites no cases in support of its claim, only the First Circuit's statement that constitutional claims are frequently raised in discharge cases, a statement that, in turn, cites no examples or authority. Pet. App. 12a. Tellingly, the Government's assertion is contrary to its earlier argument that federal employees' constitutional claims for equitable relief are "infrequently litigated." Cert. Opp. 15.

Second, claim splitting and preclusion doctrines would bar duplicative suits in the MSPB and district court. A court can dismiss a suit when it determines that a claim involving the same facts and parties is pending in a different court. *Katz v. Gerardi*, 655 F.3d 1212, 1217-18 (10th Cir. 2011). The other suit need not have reached final judgment for the rule to apply. "[T]he test for claim splitting is not whether

there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." *Id.* at 1218; *see also Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). Moreover, final MSPB decisions have preclusive effect in district court. *Morgan v. Fed. Aviation Admin.*, 657 F. Supp. 2d 146, 153 (D.D.C. 2009); *Arakawa v. Reagan*, 666 F. Supp. 254, 261 (D.D.C. 1987). Thus, as a practical matter, employees would have to choose whether to pursue claims in the MSPB or in the district court. They could not do both.

The Government also claims that authorizing claims like Petitioners' in district court would create "impractical circuit conflicts." Resp. Br. 53. Circuit conflicts on constitutional questions are a fact of our federal judicial system. In any event, preclusion of equitable constitutional claims will do little to prevent circuit splits. As noted above (at 15-16), many federal employees—those who cannot appeal to the MSPB—are already able to obtain constitutional review of agency action in district court. These suits may be decided differently in different courts, and circuit conflicts will arise.

Finally, the Government contends that a holding that Petitioners' claims are collateral to the CSRA will spawn litigation over whether claims are collateral. Resp. Br. 47-48. The Government's desired holding could reduce litigation over the "collateral" test—as could overruling *Mathews*, *McNary*, and *Johnson*—but it could also increase other litigation. Indeed, relegating this suit to the MSPB may encourage federal employees with equitable constitutional claims to argue that they are not

subject to the CSRA's review scheme so that they may litigate in district court rather than the MSPB. *See Webster*, 486 U.S. at 603. Much litigation already exists concerning who is an "employee" entitled to appeal to the MSPB. *See* 5 U.S.C. § 7511(a)(1). In December 2011 alone, the MSPB decided this question in nine cases.[8] To employees who are on the margins of MSPB jurisdiction and who have colorable constitutional claims, the Government's desired holding would create increased incentive to litigate these difficult questions.

* * *

Petitioners challenge two Selective Service statutes as facially unconstitutional. They do not bring a run-of-the-mill employment dispute that the CSRA intended to channel through the MSPB, nor do they challenge any aspect of the CSRA.

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[8] *Calderon v. U.S. Postal Serv.*, No. DE-3443-12-0071-I-1, 2011 MSPB LEXIS 7620 (M.S.P.B. Dec. 29, 2011); *Nimmo v. Dep't of Homeland Sec.*, No. NY-0752-11-0326-I-1, 2011 MSPB LEXIS 7608 (M.S.P.B. Dec. 27, 2011); *Williams v. Dep't of Veterans Affairs*, No. SF-0752-12-0111-I-1, 2011 MSPB LEXIS 7578 (M.S.P.B. Dec. 23, 2011); *Daly v. Dep't of Homeland Sec.*, No. NY-315H-11-0325-I-1, 2011 MSPB LEXIS 7519, at *7 (M.S.P.B. Dec. 21, 2011); *Atkinson v. Dep't of Defense*, No. CH-0752-12-0005-I-1, 2011 MSPB LEXIS 7287, at *4-5 (M.S.P.B. Dec. 19, 2011); *Mendez v. Dep't of Defense*, No. AT-0752-11-0894-I-1, 2011 MSPB LEXIS 7371, at *3-8 (M.S.P.B. Dec. 15, 2011); *Carr v. Dep't of Defense*, No. DC-0752-12-0117-I-1, 2011 MSPB LEXIS 7448 (M.S.P.B. Dec. 14, 2011); *Holland v. Dep't of the Army*, No. NY-0752-12-0031-I-1, 2011 MSPB LEXIS 7353 (M.S.P.B. Dec. 13, 2011); *Selover v. Dep't of the Army*, No. DC-315H-12-0116-I-1, 2011 MSPB LEXIS 7155 (M.S.P.B. Dec. 5, 2011).

Nevertheless, the Government contends that Congress impliedly precluded traditional district-court authority to hear the equitable constitutional claims of federal employees. Congress, however, is presumed not to have intended to limit jurisdiction "if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund*, 130 S. Ct. at 3150 (quoting *Thunder Basin*, 510 U.S. at 212-13). Because Petitioners' claims meet all of these criteria, the CSRA does not impliedly preclude district-court review.[9]

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[9] Petitioners contend that the CSRA does not preclude district-court review of their equitable constitutional claims. However, if the only available avenue for review of Petitioners' claims is appeal to the Federal Circuit via the MSPB, Petitioner Elgin should be permitted to seek review of his MSPB decision in the Federal Circuit under the doctrine of equitable tolling. Elgin filed this case in district court one week after the MSPB's order dismissing his claim for lack of jurisdiction became final, long before the sixty-day review period would have expired. *See* 5 U.S.C. § 7703(b)(1). This Court has endorsed equitable tolling when a plaintiff timely files in the wrong forum. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *Bowles v. Russell*, 551 U.S. 205 (2007), does not apply here because the time limit for seeking review from the MSPB is a "claims-processing rule," not a jurisdictional prerequisite. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011). Therefore, if Elgin does not prevail here, he should be allowed to argue to the Federal Circuit that the sixty-day time period has been equitably tolled.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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February 2012

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 11-45

IN THE
SUPREME COURT of the UNITED STATES

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER AND CHRISTON COLBY,

Petitioners,

v.

DEPARTMENT OF THE TREASURY, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Elaine Mittleman is an attorney with a solo practice and is a member of the Supreme Court bar. She has a long-standing interest in the protection of First Amendment and other constitutional rights for federal employees.

In 1980, after graduating from the University of Michigan Law School, Ms. Mittleman worked at the U.S. Department of the Treasury on the Chrysler Loan Guarantee program. Ms. Mittleman raised concerns about Chrysler's financial condition and its failure to submit required reports. She expressed those concerns to persons on Capitol Hill, including Representative David Stockman. Ms. Mittleman was terminated from her position by Treasury Assistant Secretary Roger C. Altman. *See* Ann Crittenden, *Treasury's Ousted Chrysler Critic*, The New York Times,

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* timely notified all parties of her intention to file this brief. Counsel for petitioners and respondents have consented to the filing of this brief and their written consent has been lodged with the Court. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

March 6, 1981, at D1; Andy Pasztor, *Chrysler to Get Additional U.S. Support Though It Hasn't Fully Met Prior Terms*, The Wall Street Journal, February 26, 1981, at 2.

In the context of her firing, Ms. Mittleman was suspected by her superiors of leaking to the press. A Treasury Inspector General (I.G.) Report was prepared because Ms. Mittleman took her concerns about monitoring Chrysler to the I.G. Mr. Altman stated in the I.G. Report that there had been several leaks to the press of information regarding Chrysler's financial and operating problems and [based on information Altman received from a congressman], "it was logical to assume that it was she who had passed Chrysler information to the reporter." Altman further stated in the I.G. Report that he ordered Ms. Mittleman to be terminated because she "lacked understanding of the real problems plus she presented a potential risk for damaging news leaks."

Ms. Mittleman sought the assistance of the Office of Special Counsel ("OSC") when she was fired. However, she was a member of the excepted service and was not an employee as defined by the Civil Service Reform Act. As a result, she did not receive any Civil Service protection from being fired. *See* Leslie Phillips, *Whistle-blower measure urges better protection*, USA Today, March 15, 1989, at 4A; David Hess, *Informers' bill clears Congress*, Philadelphia Inquirer, March 22, 1989 (in the last eight years, the special counsel has

turned down more than 99 percent of whistleblowers' complaints without initiating any corrective action; new bill is too late for Mittleman, whose case is cited by the Government Accountability Project's Thomas Devine as a "classic example of the utter failure of the 1978 Whistleblower's Protection Act.").

One provision in the Whistleblower Protection Act of 1989 was based on Ms. Mittleman's unsuccessful experience with the Office of Special Counsel. *See* S. Rep. No. 100-413, at 10-11 (1988) ("Ms. Mittleman not only did not receive any assistance from OSC on her complaint of reprisal, she was actually hurt by her contacting the OSC because of the OSC investigator's negative comments to OPM").

Based on her experience, Ms. Mittleman is extremely concerned that federal workers who engage in speech on a matter of public concern continue to lack adequate protection. *See* Paul M. Secunda, *Sound Off: Federal employees face a stunning lack of protection for free speech*, Legal Times, October 22, 2007. It is extremely important that federal employees have access to federal district courts to bring constitutional claims. Those claims are not addressed by the provisions of the Civil Service Reform Act.

SUMMARY OF ARGUMENT

This case presents complex questions concerning the constitutional claims of federal employees. In analyzing the questions, it is necessary to address the interaction between constitutional claims and statutory provisions, such as the Civil Service Reform Act.

Federal employees must have access to the district courts to present constitutional claims. The statutory provisions of the Civil Service Reform Act, although seemingly comprehensive, in fact omit fundamental constitutional concerns. The statutory scheme of the Civil Service Reform Act cannot serve to preclude federal employees from seeking judicial review of constitutional claims. The Civil Service Reform Act was not designed and does not function as a vehicle by which constitutional claims can be addressed.

Further, judicial review of constitutional claims of federal employees should be available in a timely manner. If constitutional claims can be addressed only after administrative remedies have been exhausted, then any relief may be available only long after it would serve a constructive purpose. The process available to federal employees to seek judicial review of constitutional claims should be similar to the process available to state and municipal employees pursuant to 42 U.S.C..§ 1983.

ARGUMENT

I. The Civil Service Reform Act should not preclude judicial review of constitutional claims.

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C.§ 1101 *et seq.*) established "an integrated scheme of administrative and judicial review," which provides protections and remedies for federal employment disputes. *United States v. Fausto*, 484 U.S. 439, 445, 448 (1988).

The Court discussed constitutional claims and the CSRA in *Bush v. Lucas*, 462 U.S. 367 (1983). The Court explained, 462 U.S. at 385-86 (footnotes omitted), that:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures – administrative and judicial - by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system.

The government asserted in its brief in opposition to the petition that "[u]nder the CSRA, a federal employee who believes that an unlawful adverse action, including removal, has been taken against him may appeal the agency's decision to the Merit Systems Protection Board (MSPB). ... An employee may seek judicial review of a final determination by the MSPB. 5 U.S.C.§ 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such judicial review is the United States Court of Appeals for the Federal Circuit. 5 U.S.C.§ 7703(b)." U.S. Br. in Opp. at 3.

The government further stated in its brief in opposition in this case that "the CSRA provides an avenue for judicial review of constitutional claims like petitioners' in the Federal Circuit, and thus does not 'foreclose' judicial review of such claims." U.S. Br. in Opp. at 10, n.2.

The government has portrayed the process for judicial review of constitutional claims for federal employees in an overly-simplistic manner. Not all persons who work for the federal government are permitted access to the described procedures, including review in the Federal Circuit. The term used by the government, "federal employee," is not a defined term. It is easy to generalize about federal employees without recognizing that there are different classifications of persons who work for the federal government.

Thus, even though it may appear that the CSRA is a comprehensive scheme, in fact, there are federal employees, such as those who are not civil servants, who are not protected or covered by the CSRA. Moreover, *Bush* recognized that there are actions which are not considered "personnel actions," and therefore would not be covered by this system. *Bush*, 462 U.S. at 385 n. 28.

The concurrence of Judge Stahl in *Elgin v. U. S. Dept. of Treasury*, 641 F.3d 6, 18 n. 12 (1st Cir. 2011) (Stahl, J., concurring), notes the possibility of judicial review of a colorable constitutional challenge in *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 31, 33 (1st Cir. 2001).

However, the courts have frequently found that the CSRA precludes constitutional claims, even if there is not an adequate or complete remedy. *See Hall v. Clinton*, 235 F.3d 202, 205 (4th Cir. 2000); *Hall v. Clinton*, 285 F.3d 74, 81 (D.C. Cir. 2002) (CSRA is the exclusive remedy for federal employees with individualized job grievances, even if it affords incomplete relief). This argument likely confuses whether there is an adequate remedy with whether a claim is precluded. In *Bush*, 462 U.S. at 388, the question was whether the "elaborate remedial system" should be augmented, not "what remedy the court should provide for a wrong that would otherwise go unredressed."

Bush found that an additional remedy did not need to be created when there was an elaborate remedial system. *Bush* did not address what remedy the court should provide for those whose claims would go unredressed in the CSRA. However, courts have relied on *Bush* to deprive persons of any opportunity to address constitutional claims.

Thus, Ms. Mittleman was not able to have her constitutional claims addressed on the merits or to obtain any remedy whatever. *Mittleman v. United States Treasury*, 773 F.Supp. 442, 449, 453 (D.D.C. 1991) (CSRA is the exclusive remedy; the fact that Congress explicitly denied a remedy to Schedule A employees shows an intention to deny them a statutory or constitutional remedy for damages).

These decisions, which deny judicial review of constitutional claims, are based on a sweeping presumption about congressional intent. Congress did not explicitly state that judicial review was not available. Similarly, it is doubtful that Congress explicitly indicated that Schedule A employees should not be permitted to pursue constitutional claims. A system in which Schedule A employees cannot pursue constitutional claims, but other federal employees can, presents constitutional questions of its own. One class of federal employees should not be barred from pursuing constitutional claims.

Moreover, even if a *Bivens* [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)] claim is properly found to be precluded by the CSRA, other constitutional claims should be permitted. The courts seem to have generalized from the ruling about preclusion of damages claims to preclusion of all constitutional claims.

The courts also have tended to conflate the question of whether there is an adequate remedy with the question of whether a person or claim is covered by the CSRA. The holding in *Bush* is premised on the "comprehensive nature of the remedies currently available." *Bush*, 462 U.S. at 388. *Hubbard v. Environmental Protection Agency*, 982 F.2d 531, 532 n. 1 (D.C. Cir. 1992) (a federal employee's constitutional damages claim could not proceed where CSRA provided meaningful remedy).

Thus, even though it may appear that federal employees have judicial review of constitutional claims through the CSRA, such review is often unavailable.

In the case of Ms. Mittleman, she respectfully submits that she had a strong First Amendment claim. She was fired because Treasury Assistant Secretary Altman thought she presented a potential risk for damaging news leaks.. Thus, there was prior restraint of her speech. *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (threatening penalties for future speech is a prior

restraint, which is the quintessential First Amendment violation). In spite of the obvious First Amendment concerns surrounding her termination, she was not able to obtain judicial review of her First Amendment claims,

The situation involving Ms. Mittleman shows why federal employees need direct access to federal courts. According to the statement of Mr. Altman in the I.G. Report, Ms. Mittleman presented a potential risk of damaging news leaks. However, Ms. Mittleman did not leak to the press. Further, Mr. Altman described Ms. Mittleman as a presenting a risk of leaks, but he did not undertake a leak investigation to determine what, if any, leak had occurred. Ms. Mittleman has suffered because of these false allegations, but has not been able to obtain judicial review to refute them. The CSRA clearly was not designed to cover false leak allegations and suspicions. Unfortunately, because of the finding that the CSRA provides the only review, the false allegations persist.

It cannot be disputed that there are serious constitutional issues involving federal employees which the CSRA was not designed to address and does not, in fact, address. The federal courts must be available to federal employees to pursue constitutional claims. A federal employee should not lose fundamental rights, such as access to the courts, because of the mere existence of the CSRA. Further, if a federal employee does not have a vehicle to seek a remedy for a claim of a violation of

an individual right under the Constitution, that individual right is not protected. If a constitutional violation has occurred, but no remedy is available, then that constitutional right is meaningless.

The importance of judicial review for constitutional claims cannot be overstated. Justice Blackmun emphasized in concurrence in *Fausto* that "this Court long has recognized that the Constitution itself supports a private damages action against a federal official, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and that the courts' common-law power to vindicate constitutional rights , see *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980), is not lightly to be set aside." *Fausto*, 484 U.S. at 455 (Blackman, J., concurring).

The government's brief in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006) (per curiam) stated that "[t]he language of the CSRA does not meet the 'heightened showing.' *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims." U.S. Br. at 47, *Whitman, supra* (No. 04-1131).

The statutory analysis conducted pursuant to the CSRA is an entirely different process than an analysis of claims brought under the Constitution. For example, a review under the CSRA may involve technical statutory analysis. *See, e.g., Carson v. Department of* Energy, 398 F.3d 1369 (Fed. Cir. 2005). A statute, such as the CSRA, cannot take

the place of the Constitution and the rights it guarantees.

II. Federal employees should have the same access as state and municipal workers to federal courts for constitutional claims.

State and municipal workers have access to federal courts, pursuant to 42 U.S.C. § 1983, for their constitutional claims. If a state or municipal worker brings a First Amendment speech claim to federal court, the well-known balancing test, as set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), is applied.

By contrast, it is apparently assumed that the CSRA permits review of such constitutional claims. However, review pursuant to CSRA procedures is a wholly different process than a § 1983 case in federal court. There likely is no *Pickering/Connick* balancing test under the CSRA. Similarly, it may not be significant whether the employee was speaking on a matter of public concern.

Federal employees must have access to federal courts for their constitutional claims. They should not be in an inferior position to state and municipal workers, who have ready access to federal courts for constitutional claims pursuant to 42 U.S.C. § 1983. Further, constitutional claims often are time-sensitive. Federal employees should

not have to pursue a burdensome administrative process in the hope of ultimately obtaining judicial review in the Federal Circuit. Judicial review of constitutional claims should be immediately available in district courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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